(2)

05-1486

FILE DATE
MAY 19, 2006

No. _____

In the Supreme Court of the United States

THE ESTATE OF BARBARA RAY,
JUDY RICHARD ADMINISTRATRIX,
Petitioner,
v.
KEYSTONE COAL MINING CORPORATION,
Respondent,
And,
DIRECTOR OFFICE OF WORKERS COMPENSATION PROGRAMS,
Party in Interest

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S APPENDIX VOLUME I

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United States Constitution Fifth Amendment

No persons shall be…deprived of…property without due process of law….

5 U.S.C.A. § 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [FN1] administrative law judge appointed under **Section 3105** of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of--

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with **Sections 556 and 557** of this title.

(d) The employee who presides at the reception of evidence pursuant to **Section 556** of

this title shall make the recommended decision or initial decision required by **Section 557** of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to **Section 557** of this title, except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

5 U.S.C.A. §556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of **Section 557(d)** of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or

knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C.A. § 557: Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with **Section 556** of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to **Section 554(d)** of this title, an employee qualified to preside at hearings pursuant to **Section 556** of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to **Section 556** of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses--

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions--

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--

(A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C.A. §§ 706(2)(A)

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

5 U.S.C.A. § 706(2)(E)

> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> > **(E)** unsupported by substantial evidence in a case subject to **Sections 556 and 557** of this title or otherwise reviewed on the record of an agency hearing provided by statute; or . . . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

30 U.S.C.A. §901(a)

Congressional findings and declaration of purpose; short title

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of

survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C.A. §902(b)

(b) The term "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.

30 U.S.C.A. §923(b)

(b) Utilization of personnel and procedures; evidence required to establish claim; medical evidence; affidavits; autopsy reports; reimbursement of expenses

No claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits,

from persons not eligible for benefits in such case with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. In any case, other than that involving a claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981, in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this subchapter if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest. Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of **subsections (a), (b), (c), (d), and (g) of section 221 of such Act [42 U.S.C.A. § 421(a) to (d), (g)] shall be applicable. The provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act [42 U.S.C.A. § § 404, 405(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 406, 407, 408] shall be applicable under this part with respect to a**

miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act [42 U.S.C.A. § 401 et seq.]. Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.

20 C.F.R. §718.201 Definition of pneumoconiosis.

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of

coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. §718.202 Determining the existence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may be made as follows:

(1) A chest X-ray conducted and classified in accordance with **§ 718.102** may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

(i) In all claims filed before January 1, 1982, where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of **§ 718.102** and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented. However, these limitations shall not apply to any claim filed on or after January 1, 1982.

(ii) The following definitions shall apply when making

a finding in accordance with this paragraph.

(A) The term other evidence means medical tests such as blood-gas studies, pulmonary function studies or physical examinations or medical histories which establish the presence of a chronic pulmonary, respiratory or cardio-pulmonary condition, and in the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition.

(B) Pulmonary or respiratory impairment means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion.

(C) Board-certified means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(D) Board-eligible means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(E) Certified 'B' reader or 'B' reader means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. **See 42 C.F.R. 37.51(b)(2).**

(F) Qualified radiologic technologist or technician means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a state licensing board.

(2) A biopsy or autopsy conducted and reported in compliance with **§718.106** may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy or biopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

(3) If the presumptions described in **§ § 718.304, 718.305 or § 718.306** are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in **§ 718.201**. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

(b) No claim for benefits shall be denied solely on the basis of a negative chest X-ray.

20 C.F.R. §718.205 Death due to pneumoconiosis.

(a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. In order to receive benefits, the claimant must prove that:

(1) The miner had pneumoconiosis **(see §718.202);**

(2) The miner's pneumoconiosis arose out of coal mine employment **(see §718.203);** and

(3) The miner's death was due to pneumoconiosis as provided by this section.

(b) For the purpose of adjudicating survivors' claims filed prior to January 1, 1982, death will be considered due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or

(2) Where death was due to multiple causes including pneumoconiosis and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death, or

(3) Where the presumption set forth at **§718.304** is applicable, or

(4) Where either of the presumptions set forth at **§718.303 or §718.305** is applicable and has not been rebutted.

(5) Where the cause of death is significantly related to or aggravated by pneumoconiosis.

(c) For the purpose of adjudicating survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is

met:

(1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at **§718.304** is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §725.366

(a) A representative seeking a fee for services performed on behalf of a claimant shall make application therefore to the district director, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be filed and served upon the claimant and all other parties within the time limits allowed by the district director, administrative law judge, or appropriate appellate tribunal. The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing

rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of a representative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

20 C.F.R. §725.367

(a) An attorney who represents a claimant in the successful prosecution of a claim for benefits may be entitled to collect a reasonable attorney's fee from the responsible operator that is ultimately found liable for the payment of benefits, or, in a case in which there is no operator who is liable for the payment of benefits, from the fund. Generally, the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant. The fees payable under this section shall include reasonable fees for necessary services performed prior to the creation of the adversarial relationship.

20 C.F.R. §725.456(d)

(d) All medical records and reports submitted by any party shall be considered by the administrative law judge in accordance with the quality standards contained in **part 718 of this subchapter.**

20 C.F.R. §725.477(b)

(b) A decision and order shall contain a statement of the basis of the order, the names of the parties, findings of fact,

conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance. A decision and order shall be based upon the record made before the administrative law judge.

20 C.F.R. §725.479(a) Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the district director **(see §725.478),** and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing **(see §725.481).**

20 C.F.R. §725.540 Overpayments.

(a) General. As used in this subpart, the term "overpayment" includes:

(1) Payment where no amount is payable under this part;

(2) Payment in excess of the amount payable under this part;

(3) A payment under this part which has not been reduced by the amounts required by the Act **(see §725.533);**

(4) A payment under this part made to a resident of a State whose residents are not entitled to benefits **(see §725.402 and §725.403);**

(5) Payment resulting from failure to terminate benefits to an individual no longer entitled thereto;

(6) Duplicate benefits paid to a claimant on account of

concurrent eligibility **under this part and parts 410 or 727 (see §725.4(d)) of this title or as provided in §725.309.**

(b) Overpaid beneficiary is living. If the beneficiary to whom an overpayment was made is living at the time of a determination of such overpayment, is entitled to benefits at the time of the overpayment, or at any time thereafter becomes so entitled, no benefit for any month is payable to such individual, except as provided in **paragraph (c) of this section**, until an amount equal to the amount of the overpayment has been withheld or refunded.

20 C.F.R. §725.540(d)

(d) Overpaid beneficiary dies before adjustment. If an overpaid beneficiary dies before adjustment is completed under the provisions of paragraph (b) of this section, recovery of the overpayment shall be effected through repayment by the estate of the deceased overpaid beneficiary, or by withholding of amounts due the estate of such deceased beneficiary, or both.

20 C.F.R. §802.301 Scope of review.

(a) The Benefits Review Board is not empowered to engage in a de novo proceeding or unrestricted review of a case brought before it. The Board is authorized to review the findings of fact and conclusions of law on which the decision or order appealed from was based. Such findings of fact and conclusions of law may be set aside only if they are not, in the judgment of the Board, supported by substantial evidence in the record considered as a whole or in accordance with law.

U. S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220
(412) 644-5754

In the Matter of:
JUDY M. RICHARD On Behalf of BARBARA A. RAY, Survivor of RALPH E. RAY (Deceased)
Claimant

v.

KEYSTONE COAL MINING CORP.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

DATE ISSUED:
APR 21 1998

Case No. 97-BLA-952

Appearances:

David A. Colecchia, Esq.
For the Claimant

Hilary S. Zakowitz, Esq.
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits, under the Black Lung Benefits Act. 30 U.S.C. § 901 et seq. ("Act"), filed on May 17, 1996. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;

2. surviving dependents of coal miners whose death was due to pneumoconiosis;[1] and.

---

[1] Claims filed on or after Jan. 1, 1982 (with an exception for survivors of miners who died on or before Mar. 1, 1978 (20 C.F.R., §718.306)), 20 C.F.R. §718.1

3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time for their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers pneumoconiosis" "CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant, Judy M. Richard, the sister of Barbara A. Ray, the disabled child of Ralph Edward Ray, filed a survivor's claim, on behalf of Barbara A. Ray, for black lung benefits on May 17, 1996.[2] (Director's Exhibit ("DX") 1). The claim was initially approved on October 9, 1996. A subsequent final decision was issued, on February 6, 1997, finding that the miner had pneumoconiosis (Black Lung Disease), but had not died due to pneumoconiosis, and benefits were denied. (DX 35). This case was referred to the Office of Administrative Law Judges, on April 3, 1997, by the Director, Office of Workers' Compensation Programs (OWCP) for a formal hearing. (DX 39). I was assigned the case on August 8, 1997.

On December 18, 1997, I held a hearing in Pittsburgh, Pennsylvania, at which the claimant and employer were represented by counsel. No appearance was entered for the Director, Office of Workers' Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-5, Director's exhibits ("DX") 1-39, and Employer's exhibits ("EX") 1-7 were admitted into the record.

Post-hearing evidence, admitted without objection, consists of: CX 6, Dr. Wald's deposition of January 27, 1998; and Dr. Sinnenberg's supplemental report (March 4, 1998) (EX 8) commenting on Dr. Wald's deposition.

ISSUES

I. Whether the miner had pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner's death was due to pneumoconiosis?

IV. Whether Barbara A. Ray is an eligible dependent of the miner?

V. Whether Barbara A. Ray is an eligible survivor of the miner?

---

[2] The miner's claim, filed April 1, 1987, was finally denied by the Decision and Order of Administrative Law Judge Colligan, on June 2, 1989. (DX 38-1). (Exhibits from the miner's claim will be designated with a "DX 38" prefix). Judge Colligan found the miner had not established the existence of C.W.P.

FINDINGS OF FACT

I. Background

A. Coal Miner[3]

The parties agreed and I find the miner was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least thirteen years. (DX 1-2; TR 6).

B. Date of Filing

The claimant filed her claim for benefits, under the Act, on May 17, 1996. (DX 1). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator[4]

Keystone Coal Mining Corp., which is self-insured, is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart F, Part 25 of the Regulations.[5] (DX 23). Keystone Coal Mining Corp. is a subsidiary of Rochester & Pittsburgh Coal Company. (DX 21).

D. Dependency and Survivorship

Barbara A. Ray was born June 14, 1961 and is the legitimate, disabled, daughter of Ralph E. Ray. (DX 1. 9; Hearing Transcript (TR) 15). Ms. Ray's mother died on January 8, 1992 and she has lived with her sister for the past two years. (TR 28). Ms. Ray, who has been disabled since birth, has never married, and, has attended St. Joseph's School for the Handicapped for

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[3]Subsection 718.301(a) provides that regular coal mine employment may be established on the basis of any evidence presented, including the testimony of a claimant of other witnesses and shall not be contingent upon a finding of a specific number of days of employment within a given period. The claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984).

[4]Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator, or if the responsible operator is unknown or is unable to pay benefits, with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.493(a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.

[5]20 C.F.R. § 725.492. The terms "operator" and "responsible operator" are defined in 20 C.F.R. §§ 725.491 and 725.492. The regulations provide two rebuttable presumptions to support a finding the employer is liable for benefits: (1) a presumption that the miner was regularly and continuously exposed to coal dust: and (2) a presumption that the miner's pneumoconiosis arose out of his employment with the operator. 20 C.F.R. §§ 725.492(c) and 725.493 (a)(6). To rebut the fist, the employer must establish that there were *no* significant periods of coal dust exposure. *Conley v. Roberts and Schaefer Coal Co,.* 7 B.L.R. 1-309 (1984): *Richard v. C & K Coal Co.,* 7 B.L.R. 1-372 (1984); *Zamski v. Consolidation Coal Co.,* 2 B.L.R. 1-1005 (1980). To rebut the second, the operator must prove "within reasonable medical certainty or at least probability by means of fact and/or expert opinion based thereon that the claimant's exposure to coal dust in his operation, at whatever level, did not result in, or contribute to, the disease." *Zamski v. Consolidation Coal Co,.* 2 B.L.R. 1-1005 (1980). Neither, presumption has been rebutted in this case.

twenty-one years. (TR 15, 28-29). On June 11, 1996, she was examined and diagnosed by Dr. Mohan Patel, on behalf of the Department of Labor, as having cerebral palsy, a physical and mental impairment with an onset date of her birth date. (DX 2). Ms. Richards was unaware of the diagnosis. (TR 29). Ms. Ray

became entitled to disabled adult child's Social Security benefits in August 1987 from her father's record. (DX 10). The Social Security Administration determined the date of onset of disability was her birth date. (DX 10-11). Thus, Ms. Ray is eligible as a surviving dependent disabled child.[6] 20 C.F.R. §§ 725.209 (a)(2)(ii) & 725.221.

E. Personal and Employment

The decedent miner was born on March 23, 1932 and died on April 18, 1996. (DX 1;12). He married Margaret Ray, on March 22, 1957. (DX 8). He worked in the coal mines for Rochester & Pittsburgh Coal Company from December 26, 1973 through March 26, 1978 and Keystone Coal Mining Corp. from March 27, 1978 through his retirement on February 10, 1987, a period of about fourteen years. (DX 5-7; TR 18). The claimant's last position in the coal mines was that of a belt cleaner. (DX 5). In that position, he maintained the belt that conveyed the dusty mine coal to the surface and his duties included placing coal that fell from the belt back onto it by shoveling. He smoked about two packs a day until two to four years before his death. (TR 19, 32). Mr. Ray suffered a heart attack in January 1996. (TR 31).

II. Medical Evidence

A. Chest X-rays

There were at least 31 readings of approximately 21 x-rays, taken between February 11, 1987 and April 15, 1996. (Appendix A). The overwhelming majority were taken during hospitalizations. Only nine of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102 (b). Only four readings of four x-rays are positive, by four physicians, Drs. Harrison,

Zuck, Connelly and Navani. Drs. Harrison, Zuck, and Navani are board-certified in radiology. Dr. Navani is also a B-reader.[7] Dr. Connelly is only a "field-reader." There was one "0/1" reading by Dr. Palmer of the 10/21/88 x-ray; he is a B-reader and board-certified in radiology. Five readings of four x-rays were specifically found "0/0," by Drs. Wolfe, Scott, and Fiehler. The latter two are B-readers. Dr. Wolfe is a B-reader and board-certified in radiology.

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[6] For the purposes of determining eligibility for survivors benefits for a *disabled* child, as defined at § 223(d) of the Social Security Act, such disability must have begun before the child attained the age of 18. *Lupasky v. Director, OWCP,* 7 B.L.R.1-532 (1984). A "disability" is defined as "the inability to engage in substantial gainful activity by reason of any medically demonstrable physical or mental impairment;" therefore, medical evidence must be produced to establish disability, and the claimant's statements, standing alone, are insufficient to meet the burden of proof. *Tackett v. Director, OWCP,* 10 B.L.R. 1-117 (1987).

[7] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308 (3rd Cir. 1995) at 310,n.3. "A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading x-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. §37.51. Courts generally give greater weight to x-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP,* 484 U.S.135, 145 n. 16. 108 S.Ct. 427, 433 n.. 16, 98 L. Ed. 2d 450 (1987); *Old Ben Coal*

Co. v. Battram, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993)." (The "Chest x-ray" table herein contains a "B" for physicians so qualified).

The remainder generally report pulmonary fibrosis, emphysema, defects consistent with COPD, hyperexpansion, hyperinflation, patchy densities, some infiltrate, atelectatic changes, and, scarring, but not CWP.

Physician Date Exh.#	Age Height	FEV_1	MVV	FVC	Tracings*	Compre- hension Cooper- ation	Qualify ** Conform ***	Dr.'s Impression
Patel/Heilman 2/11/1987 DX 13, 38-	54 69"	0.68 1.10+		2.11 3.03+	no		yes no no+ no	Reduced vital capacity & severely reduced flow with some post-broncho-dilator improvement. Enormous residual volume, large lung capacity & reduced DLCO indicators severe emphysema.
Schiff/Bajwa 4/29/1987	55 67"	1.00	40	2.22	yes	good good	yes yes	Severe air flow obstruction possibly
Physician Date Exh.#	**Age Height**	**FEV_1**	**MVV**	**FVC**	**Tracings***	**Compre- hension Cooper- ation**	**Qualify ** Conform *****	**Dr.'s Impression**
DX 34		1.16+	39+	2.33+			yes+ yes+	reversible.
Schiff 6/2/1987 DX 34, 38-	55 67.5"	0.90	32	1.68	yes	good good	yes yes	Validated by Dr. Candler, Dr. Scott finds severe airway obstruction.
Scott 3/4/88 DX 38-	55 68"	0.93 1.01+	32 40+	2.72 2.94+	yes	good good	yes yes yes+ yes+	
Eligator 10/21/88 DX 38-	56 67.5"	0.63	21	1.26	yes	best good	yes yes	
Physician Date Exh.#	**Age Height**	**FEV_1**	**MVV**	**FVC**	**Tracings***	**Compre- hension Cooper- ation**	**Qualify ** Conform *****	**Dr.'s Impression**
Connelly 2/6/89 DX 38-	57 67.5"	0.63	21	1.26	no		yes no	
Bush 2/15/89 DX 38-	57 67"	0.89 0.76	22	2.16 2.67+	yes	not giving max effort	yes no yes+ no	

*A Judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-83 (1984).

A "qualifying**" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

***A study "**conforms**" if it complies with applicable quality standards (found in 20 C.F.R. § 718.103(b) and (c)). (*see Old Ben Coal Co. v. Battram*, 7 F.3d. 1273. 1276 (7th Cir. 1993)). A judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

+Post-bronchodilator.

For a miner of the miner's height of 67.5 inches, § 718.204(c)(1) requires an FEV_1 equal to or less than 1.86 for a male 57 years of age.[8] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.40 or an MVV equal to or less than 76; or a ratio equal to or less than 55% when the results of the FEVI test are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	Age	FEV_1	FVC	MVV
67.5"	54	1.94	2.45	78
69"	54	2.06	2.61	83
67"	55	1.89	2.40	76
67.5"	55	1.92	2.44	77
68"	55	1.98	2.51	79
67.5"	56	1.91	2.42	76
67.5"	57	1.89	2.40	76
67"	57	1.86	2.36	74
67.5"	57	1.89	2.40	76

B. Arterial Blood Gas Studies[9]

Blood gas studies are performed to detect an impairment in the process of aveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise.

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[8] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 43 F.3d 3 (4th Cir. 1995). I find the miner is 67.5" here.

[9] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.
20 C.F.R. § 718.204(c) permits the use of such studies to establish "total disability." It provides: In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4), or (5) of this section shall establish a miner's total disability:...

(2) Arterial blood gas tests show the values listed in Appendix C to this part...

Date Ex. #	Physician	pCO_2	pO_2	Qualify	Physician Impressions
2/11/87 2/13/87 DX 13, 38-	Patel	42.4 47.2+	65.6 66.9	No	No
6/2/87 DX 34, 38	Barnes	33.2	64.2	Yes	Mild hyperventilation with moderate hypoxemia. Dr. Scott finds mild hypoxia
3/4/88 DX 38-	Scott	40	66	No	
2/15/89 DX 38-	Bush	38.8	66.9	No	
5/4/94 DX 13	Oehrle	48.6	57	Yes	
2/28/96	Oehrle	49.1	104	No	
4/15/96 DX-13	Patel	49.1	48	yes	

A lower level of oxygen (02) compared to carbon dioxide in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

*Results, if any, after exercise.

C. Physicians' Reports

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R § 718.204(c)(1), (2), or (3), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable in gainful work. § 718.204(b).

Dr. John Scott, is a B-reader and is board-certified in internal medicine and pulmonary medicine. (DX 34). His report on behalf of the employer, dated December 31, 1996, based upon his review of the medical records of the claimant and several consulting reports notes 16-17 years of coal mine employment and a 1-2 pack per day, 20-year smoking history. (DX 34). Dr. Scott had reported on his previous examination of the miner, on March 4, 1988. At that time he had diagnosed poorly controlled hypertension and chronic obstructive pulmonary disease with emphysema not resulting from coal dust exposure but rather from cigarette smoking and respiratory infections. He found

the miner's marked respiratory impairment was from emphysema. Dr. Scott diagnosed: CAD; an MI; hypertension; and severe chronic obstructive pulmonary disease with evidence of pulmonary emphysema. He opined the miner died of COPD and emphysema which superimposed respiratory infection and pneumonia due to his long history of cigarette smoking. CAD and hypertension were often factors involved in his death. Dr. Scott does not believe occupational coal dust contributed to his death. (DX 34).

Dr. Michael E. Wald, who is an A-reader, board-certified in internal medicine and specializing in pulmonary medicine submitted a report dated September 21, 1997. (CX 1; CX 6). His report, based upon his review of the claimant's enumerated medical records, notes 17 years of coal mine employment and a one pack per day 20-year smoking history, quitting in about 1980. (CX 1, 6). Dr. Wald observed PFS are fairly consistent showing a severe degree of airways obstruction. He noted Mr. Ray died of respiratory failure. (CX 1; Dep. 14). He opined Mr. Ray's CT scan and x-rays show he had emphysematous lungs with hyperinflation and interstitial fibrosis. (CX 1; Dep. 16-17). He did not observe any nodular densities in the upper lobes indicative of CWP but those could "possibly" be masked by emphysematous changes. (CX 1; Dep. 18-19, 45). Dr. Wald admitted he could not argue with the experts who found no "absolutely definitive" CWP on the x-rays. He did not himself diagnose CWP by x-ray. (Dep. 44). He wrote that Mr. Ray had evidence of chronic bronchitis and pulmonary emphysema together referred to as COPD. (CX 1; Dep. 19-20). While Mr. Ray's cigarette smoking played a (definite and predominant) contributing role in his COPD (and chronic bronchitis), his coal mine dust exposure was a substantial contributing "factor in the

progression of the disease state to the point of ultimate demise." (CX 1; Dep. 19-20, 40, 43).

Dr. Wald testified at a deposition, on January 27, 1998. (CX 6). He reiterated his credentials and the findings he had reported earlier. Dr. Wald devoted over half his practice to the subspecialty of respiratory and pulmonary diseases and treats patients with CWP regularly. (Dep. 9-11). He admitted the exact cause of pulmonary emphysema is unknown, but that the incidence of the disease in smokers was higher. (Dep. 19). Dr. Wald testified that coal dust exposure contributed to, accelerated and aggravated Mr. Rays' chronic respiratory disease process, initially triggered by his smoking, shortening his life to the point of initial disability and ultimately to his death. (Dep. 20-23, 50-51, 56). He disagreed with Dr. Sinnenberg's opinion that Mr. Ray's 17 years of coal dust exposure played no role in his disease. (Dep. 23-25). However, he agreed with the former's opinion that CWP was not a significant factor and that smoking was a major factor. (Dep. 25).

Dr. Wald explained that Mr. Ray did not have medically-defined CWP, but did have legally-defined CWP. (Dep. 33-35, 58). He opined that subsequent to coal dust exposure there is a "latency period" of several years when one may not see the manifestations of CWP which appear later. (Dep. 34). However, had the legal determination that Mr. Ray did not have CWP, in 1989, been correct, the chance of developing "clinical" CWP later was very small. (Dep. 35). Dr. Wald testified that CWP is predominantly a "restrictive" non-reversible, impairment but "obstructive" impairment will be seen in the complicated forms of CWP. (Dep. 37-38).

Dr. Wald admitted Mr. Ray's PFS consistently showed "obstructive" impairment with only partial

reversibility. (Dep. 37, 39). When confronted with a significantly greater smoking history, Dr. Wald did not change his opinion concerning the impact of Mr. Ray's coal dust exposure. (Dep. 41-44). He opined one cannot separate out the effect of smoking and CWP on one's lung impairment. (Dep. 47). Dr. Wald added that Mr. Ray's heart afflictions, i.e., hypertension and Cad, although "significant" conditions unrelated to coal dust exposure, were not substantial factors in his death. (Dep. 52-53, 55).

Dr. Robert Sinnenberg is board-certified in pathology. (EX 4). His consultation report, based upon his review of the claimant's enumerated medical records, on September 19, 1997, notes 16 years of coal mine employment and a one to two pack per day, 30-year smoking history. (EX 3; Dep. 9). Dr. Sinnenberg wrote that the objective medical evidence, i.e., x-rays, fail to substantiate a CWP diagnosis. The PFS show COPD with the increased lung capacity associated with emphysema, due to smoking, not CWP. Dr. Sinnenberg believed Mr. Ray's occupational exposure cause industrial bronchitis which was reversible and ceased upon leaving coal mine employment. (EX 3). If CWP was present at all, and given the occupational exposure it may have, it was so mild or minimal as to play no clinically significant role in Mr. Ray's pulmonary disease, which is attributed to smoking, or death. The numerous exacerbations of his COPD (and his pulmonary emphysema from smoking) led to chronic respiratory failure and ultimately the cause of his death. (EX 3; Dep. 11).

Dr. Sinnenberg testified at a deposition, on November 25, 1997. (EX 7). He is board-certified in anatomic and clinical pathology. (Dep. 3). He provided his credentials and reiterated the substance of his earlier report. Dr. Sinnenberg testified that

beginning in 1987 Mr. Ray experienced fairly severe COPD with two components, pulmonary emphysema and chronic bronchitis. (Dep. 10). Mr. Ray's long history of heavy smoking alone caused his COPD as substantiated by objective medical tests. (Dep. 10). Mr. Ray's long history of heavy smoking alone caused his COPD as substantiated by objective medical tests. (Dep. 12). He admitted Mr. Ray probably had a very mild form of CWP which played no role in, did not hasten and was not a substantial contributing factor in his death. (Dep. 13-14). Dr. Sinnenberg said Dr. Wald's September 21, 1997 opinion did not effect his conclusions. (Dep. 14). He said coal dust exposure does not exacerbate emphysema but bronchitis can cause problems which could make emphysema worse. (Dep. 16-19).

Dr. Sinnenberg provided a review of Dr. Wald's letter and deposition, dated march 12, 1998. (EX 8). He disagreed with Dr. Wald's letter a deposition, dated March 12, 1998. (EX 8). He disagreed with Dr. Wald's conclusion that coal dust exposure irreversibly aggravated Mr. Ray's chronic bronchitis which produced a lasting effect on his pulmonary status. He observed the evidence of CWP at most equivocal and simple CWP is not associated with centrilobular emphysema. Cigarette smoke was the only known irritant Mr. Ray was exposed to after leaving coal mining in 1987 and it undoubtedly caused the progression of his lung disease. He pointed out that centrilobular emphysema and bronchitis are separate and distinct from CWP.

III. Hospitalizations

The miner was hospitalized from February 11, 1987 to February 18, 1987, and treated by Dr. Patel. (DX 13). Dr. Patel noted he smokes 1-2 packs per day and

was working as a coal miner. He was admitted with sudden severe shortness of breath and a history of back injury. (DX 13). Based upon x-ray, EKG, AGS, laboratory test results, examination and history, Dr. Patel diagnosed: acute bronchitis; acute exacerbation of COPD; and, hypertension. (DX 13).

Mr. Ray was hospitalized, at the Allegheny Valley Hospital, from February 23, 1995 through March 11, 1995, for severe chronic obstructive pulmonary disease, where he was treated by Dr. Patel. (DX 13). Based upon x-ray, EKG, laboratory test results, examination and history, Dr. Patel diagnosed: acute respiratory failure; acute anterolateral wall myocardial infarction; COPD; uncontrolled hypertension; gastrointestinal bleeding; and, anemia of blood loss. (DX 13).

Mr. Ray was hospitalized, at the Allegheny Valley Hospital, from September 17, 1995 through September 23, 1995 where he was treated by Dr. Patel. (DX 13). Based upon x-ray, EKG, laboratory test results, examination and history, Dr. Patel diagnosed: right perihilar infiltrates; acute exacerbation of COPD; hypertension; chronic hypoxemic and hypercapnic respiratory failure; hypoatremia secondary to SIADH[10]; and, arteriosclerotic heart disease (ASHD) with old "MI" (Myocardial Infarct). (DX 13). During this hospitalization, pulmonary consultant Dr. Fiehler diagnosed exacerbation of COPD with bronchiectasis and noted chronic hypoxia with hypercapnia on home O2.

Mr. Ray was hospitalized, at the Allegheny Valley Hospital, From February 29, 1996 through March 4, 1996 where he was treated by Dr. Patel. (DX 13). During an acute respiratory failure requiring ventilation therapy, he suffered a myocardial infarction. Based upon x-ray, EKG, laboratory test results, examination

and history, Dr. Patel diagnosed: acute bronchitis; acute exacerbation of COPD; coronary artery disease, hypertension; SIADH; and, history of subendocardial myocardial infarction. Dr. Patel's assessment, listed on the history & physical, included "cor pulmonale."

The miner was again hospitalized from March 29, 1996 to April 14, 1996 and treated by Dr. Patel. (DX 13). Based on x-rays, CT scan, EKG, examination and history, Dr. Patel diagnosed: pneumonia; acute exacerbation of COPD; end-stage COPD; discogenic disease; grade I anterolisthesis; coronary artery disease; hypertension; SIADH; and Arteriosclerotic heart disease (ASHD) with old "MI" (Myocardial Infarct). Dr. Patel noted the miner "smokes about one pack per day for about 30 years."

The miner was admitted for his final hospitalization on April 15, 1996, with severe shortness of breath and inability to breathe. (DX 13). Based on x-ray, AGS, EKG, laboratory test results, examination and history, he was diagnosed, by Dr. Patel, with: acute and chronic respiratory failure; bilateral infiltrates; end-stage COPD; Arteriosclerotic heart disease (ASHD) with old "MI" (Myocardial Infarct); coronary artery disease; hypertension; and, SIADH. (DX 13). DX 15 duplicates medical report entries found in DX 13. A pulmonary consultation by Dr. Edwin Rao, on April 16, 1996, reported his assessment of: hypoxic hypercarbic respiratory failure; end-stage COPD; cor pulmonale; hypoatremia with SIADH history; CAD history; and

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[10] SIADH "Syndrome of inappropriate antidiuretic hormone." Dorland's Illustrated Medical Dictionary, 28th Ed. (1994) at 1518.

silicon & coal exposure. The consult noted a PFS had not been conducted and that x-rays were compatible with chronic scarring and Hyperexpansion consistent with COPD. A two pack per day, 30-year smoking history was noted.

IV. Other

A CT scan, on January 13, 1993, revealed: multiple emphysematous blebs of the hilum bilaterally; increased scarring of the right lower lung anteriorly may be fibrotic; no abnormal mass, pneumonic consolidation or pleural effusion.[11] (DX 13). This was later reviewed, for the employer, by Dr. Stuart S. Sagel who found no definite evidence of CWP or silicosis and wrote, "the dominant pulmonary pathology is (centrilobular) emphysema (undoubtedly (usually) related to cigarette smoking)." (DX 19). Dr. Sagel found no interstitial infiltrate or findings compatible with CWP. The infiltrate and/or scarring he observed was probably secondary to a prior inflammation such as pneumonia. He found arteriosclerosis and slight enlargement of the coronary arteries compatible with pulmonary hypertension and secondary to emphysema. (DX 19). Dr. Sagel, who is very well published in his field, is board-certified in radiology and a diplomat of the National Board of Medical Examiners. (DX 19). Dr. Scott reviewed this CT scan and found no evidence of CWP or interstitial fibrosis. (DX 34, p. 10).

An oximetry evaluation on May 5, 1994, by Dr. Heilman, revealed: reduced O2-Hbg saturation at rest with further reduction upon minimal exertion. Dr. Heilman recommended supplemental O2 if the patient was active. (DX 13, 15). An echocardiogram, on August 8, 1994, conducted by Dr. Srini, consulted by Dr. Patel, resulted in the following impressions: thickened aortic valve with trace aortic insufficiency;

no evidence of aortic stenosis; calcified mitral annulus with mild mitral regurgitation; mild tricuspid regurgitation; excellent LV function. (DX 13). A similar study by Dr. Husaini, on August 25, 1994, revealed: arteriosclerosis with no stenosis; mild MR; Trace AI; mild TR; and LV size and function normal. (DX 13.)

Dr. Patel's office or progress notes, from February 1987 through 1996, appear to be contained in DX 14. They show the miner had variably reported shortness of breath, productive coughing, resulting in diagnoses of: severe COPD; hypertension; bronchitis; diabetes; ASHD; hyponatremia; SIADH; cor pulmonale; room air hypoxia; and, other non-respiratory afflictions. He was prescribed O2 in 1994. (DX 14).

V. Witness Testimony

Ms. Judy Richards testified that her sister, Barbara Ray, is the daughter of Ralph e. Ray, Senior, and Margaret N. (Rosenburg) Ray. (TR 15). Ms. Ray has received Social Security disability income since age 19. (TR 16). She is handicapped, cannot read, and must use a walker or wheelchair. (TR 16). She said Mr. Ray worked as a coal miner from about 1972 until his retirement in 1986 from shortness of breath. (TR 17). She admitted Mr. Ray was a cigarette

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[11] *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991). A CAT scan fall into the "other means" category of 20 C.F.R. § 718.304(c) rather than being considered an x-ray under § 718.304(a). A CAT Scan is "computed tomography scan or computer aided tomography scan. Computed tomography involves the recording of 'slices' of the

body with an x-ray scanner (CT scanner). These records are then integrated by computer to give a cross-sectional image. The technique produced an image of structures at a particular depth within the body, bringing them into sharp focus while deliberately blurring structures at other depths. *See*, The Bantam Medical Dictionary, 96, 437 (Rev. Ed. 1990)."

smoker, averaging about two packs per day until about two to four years before his death. (TR 19). During the six months preceding Mr. Ray's death, Ms. Richards visited daily, helped administer oxygen, helped with household tasks, and observed the miner's shortness of breath. (TR 19).

In January 1996, the miner contracted pneumonia, had a heart attack, and was hospitalized. (TR 22). He was sent home the third week of January 1996, placed on medications, and had a visiting nurse. (TR 23). Three months later he was hospitalized for pneumonia and spent two weeks in the intensive care unit (ICU). He was discharged on April 16, 1996 only to return to the hospital on April 18, 1996. He asked for no more life support and died on that day. (TR 25).

VI. Death Certificate

Dr. Mohan Patel, who signed the death certificate on April 19, 1996, listed the immediate cause of death as "end stage chronic obstructive lung disease" of "years" duration with other significant conditions listed as "CAD and HPN." (DX 12). Presumably, "CAD" is coronary artery disease and "HPN" is not defined. The death certificate indicates no autopsy was performed and that the miner died of natural causes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

Part 718 applies to survivor's claims which are filed on or after April 1, 1980. 20 C.F.R. § 718.1. There are four possible methods of analyzing evidence in a survivor's claim under Part 718: (1) where the survivor's claim in filed prior to January 1, 1982 and the miner is entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (2) the survivor's claim is filed prior to January 1, 1982 and there is no living miner's claim or the miner is not found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; (3) the survivor's claim is filed after January 1, 1982 and the miner was found entitled to benefits as the result of a living miner's claim filed prior to January 1, 1982; and (4) the survivor's claim is filed after January 1, 1982 where there is not living miner's claim filed prior to January 1, 1982 or the miner is found not entitled to benefits as a result of a living miner's claim filed prior to January 1, 1982. The fourth, Subsection 718.205(c) applies to this claim.[12]

The Part 718 regulations provide that a survivor is entitled to benefits only where the miner *died due to pneumoconiosis.*, 20 C.F.R. § 718.205(a). As a result, the survivor of a miner who was totally disabled due to pneumoconiosis at the time of death, but died due to an unrelated cause, is not entitled to benefits. 20 C.F.R. § 718.205(c). Under § 718.205(c)(4), if the principal

[12] The survivor is not entitled to the use of lay evidence, or the presumptions at §§ 718.303 and 718.305 to aid in establishing entitlement to survivors' benefits. (A survivor is automatically entitled to benefits only where the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982. However, a survivor is not automatically entitled to such benefits under a claim filed on or after January 1, 1982 where the miner is not entitled to benefits as a result of the miner's claim filed prior to January 1, 1982 or where no miner's claim was filed prior to January 1, 1982. *Neeley v. Director, OWCP.* 11 B.L.R.1-85 (1988)

cause of death is a medical condition unrelated to pneumoconiosis, the survivor is not entitled to benefits unless the evidence establishes that pneumoconiosis was a substantially contributing cause of the death.

The Board has held in a Part 718 survivor's claim, the Judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the miner's death was due to the disease under § 718.205. *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993).

B. Existence of Pneumoconiosis

30 U.S.C. § 902(b) and 20 C.F.R. §718.201 define pneumoconiosis as a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[13] The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

"....[T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP,* 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78 914 F.2d 35 (4th Cir. 1990) citing, *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP,* 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.,* 6 B.L.R. 1-666 (1983).
Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.,* 60 F.3d 173, 175 (4th Cir. 1995).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the four means of establishing the existence of pneumoconiosis by: [14] (1) a chest x-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or

[13] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa lee Mines v. Director,* 86 F.3d 1358 (4th Cir. 1996)(*en banc)* at 1364; *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308 (3d Cir. 1995) at 314-315.

[14] 20 C.F.R. § 718.305 creates a rebuttable presumption of pneumoconiosis under certain facts for claims filed before Jan. 1, 1982. 20 C.F.R. § 718.306 establishes a presumption of entitlement applicable to certain death cases where the miner died on or before Mar. 1, 1978.

(4)a determination of the existence of pneumoconiosis made by a physician exercising sound judgment based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a).

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable.

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence[15] 20 C.F.R. § 718.202(a)(1)."[W]here two or more x-ray reports are in conflict, in evaluating such x-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays," *Id.; Dixon v. North Camp Coal Co.,* 8 B.L.R. 1-344 (1985). "(emphasis added.) (Fact one is board-certified in internal medicine or highly published is not so equated).*Melnich v. Consolidation Coal Co. &*

Director, OWCP, 16 B.L.R. 1-31 (1991)at 1-37. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if no superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985).

There were at least 31 readings of approximately 21 x-rays, taken between February 11, 1987 and April 15, 1996. (Appendix A). The overwhelming majority were taken during hospitalizations. Only nine of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102(b). Only four readings of four x-rays are positive, by four physicians, Drs. Harrison, Zuck, Connelly and Navani. Drs. Harrison, Zuck, and Navani are board-certified in radiology. Dr. Navani is also a B-reader. Dr. Connelly is only a "field-reader." There was one "0/1" reading by Dr. Palmer of the 10/21/88 x-ray; he is a B-reader and board-certified in radiology. Five readings of four x-rays were specifically found "0/0," by Drs. Wolfe, Scott, and, Fiehler. The latter two are B-readers. Dr. Wolfe is a B-reader and board-certified in radiology. The remainder generally report pulmonary fibrosis, emphysema, defects consistent with COPD, hyperexpansion, hyperinflation, patchy densities, some infiltrate, atelectatic changes, and scarring but not CWP.[16]

I find only two x-rays of the 31 positive for CWP; those of 10/21/88 and 4/3/96. There is nothing to contradict the 10/21/88 finding. The 4/3/96 x-ray was read "1/1" by Dr. Navani, a b-reader and board-certified radiologist. Dr. Kim, whose qualifications are unknown, did not find CWP, but did not "classify" the reading. Thus, I give his reading lesser weight. Dr. Sargent, a B-reader and board-certified radiologist, found the 6/2/87 x-ray negative. Since he is "dually-

qualified," I give his reading greater weight than Dr. Harrison's, a boa[illegible]ertified radiologist. *Harold v. Director, OWCP*, [illegible].B. No. 94-2354 BLA (Mar. 23, 1995) (Unpublished). The remainder of the readings did not find CWP. However, they do find COPD

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[15] "There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis. 2/3 is the fourth highest profusion and 3/2 the third. *See* N. LeRoy Lapp, "A Lawyer's Medical Guide to Black Lung Litigation." 83 *W. Va.. Law Review* 721. 729-731 (1981). "Cited in *Lisa Lee Mines v. Director,* 86 F.3d 1358 (4th Cir. 1996) (*en banc)* at 1359.n. 1.

[16] A judge is not required to defer to the numerical superiority of x-ray evidence, although it is within his or her discretion to do so. *Wilt v. Woverine Mining Co.* 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal,* 14 B.L.R. 1-65 (1990).

and emphysema, which may fall within the legal definition of CWP. Standing alone, however, the x-rays do not establish CWP.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative x-ray, 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP,* 6 B.L.R. 1-1127 (1984). However, where the physician's report although documented fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.,* 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it. *White v. Director, OWCP,* 6 B.L.R. 1-368 (1983).

Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP,* 7 B.L.R. 1-597 (1984). Because of their various board certifications, B-reader status and expertise, as noted above, I rank Drs. Patel and Bajwa below the other physicians because their qualifications are unknown. I give somewhat greater weight to the opinions of the board-certified pulmonologists than that of a board-certified pathologist on the issue of the contribution of coal dust exposure to the miner's COPD, particularly since no autopsy or biopsy was performed. However, I give the pathologist's opinion equal weight on issues relating to the cause of death.

Dr. Patel was Mr. Ray's treating physician for about ten years. As such, generally his opinion would ordinarily be entitled to more weight. *Onderko v. Director, OWCP,* 14 B.L.R. 1-2 (1989).[17]

In the miner's denied claim, seven physicians gave opinions. Three, Drs. Eligator, Cander, and Connelly, found CWP.[18] Four, Drs. Scott, Tuteur, Bush, and

Bajwa believed Mr. Ray did not have CWP. Dr. Cander is a board-certified internist. The credentials of Drs. Eligator, Connelly and Bajwa are unknown and thus their opinions merit little weight. Drs. Scott, Tuteur, and Bush are all board-certified in internal medicine and pulmonary diseases, thus their opinions carry greater weight. The latters,' pre-1990 opinions, show that medically defined CWP was not established at the time. Dr. Bush found the miner's respiratory condition was due to his smoking and Drs. Tuteur and Sinnenberg agreed. (DX 38). However, as a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and

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[17] But see, *Amax Coal Co. v. Franklin,* 957 F.2d 355 (7th Cir. 1992) where the court criticized the administrative law judge's crediting of a treating general practitioner, with no apparent knowledge of CWP and no showing that his ability to observe the claimant over an extended time period was essential to understanding the disease, over an examining board-certified pulmonary specialist bordered on the irrational. The Court called judge's deference to the "treating physician" over a non-treating specialist unwarranted in light of decisions such as *Richardson v. Perales,* 402 U.S. 389, 91 S.Ct. 1420.28 L.Ed.2d 842 (1971); *Garrison v. Heckler*, 765 F.2d710, 713-15 (7th Cir. 1985); and, *DeFrancesco v. Bowen,* 867 F.2d 1040. 1043 (1989).

[18] Dr. Eligator relied on a 1988 positive x-ray reading, among other matters to reach his diagnosis.

irreversible disease. *Stanford v. Director, OWCP,* 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.,* 6 B.L.R. 1-166 (1983); and, *Call v. Director,*

OWCP, 2 B.L.R. 1-146 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). Mr. Ray had just retired in February, 1987. As Dr. Wald reported, CWP may not have been readily detectable at that early stage.

Dr. Patel whose qualifications are unknown, treated Mr. Ray from 1987 until his death in 1996. Although he never diagnosed CWP, his consistent diagnosis of COPD, CAD, ASHD, cor pulmonale and emphysema were uncontroverted.[19] A diagnosis of cor pulmonale is an established indicator of the existence of pneumoconiosis. *Christian v. Monsanto Corp.*, 12 B.L.R. 1-56, 1-58 (1988). While Dr. Wald, who is board-certified in internal and pulmonary medicine, never found medically-defined CWP, he found the miner's COPD was due in part to his coal mine dust exposure which constitutes "legal" CWP. Although Dr. Scott, the employer's consultant who is board-certified in internal and pulmonary medicine, disagreed, Dr. Sinnenberg, a the employer's second board-certified pathologist, candidly admitted Mr. Ray probably had CWP based upon his occupational exposure. Dr. Sinnenberg's opinion that smoking is the most common cause of COPD is not disputed. Although Dr. Scott provides a thorough review of the medical records, he does not give satisfactory and legitimate reasons why the miner's 13 years of coal mine dust exposure played no role in his COPD.[20] Dr. Wald's explanation, however, that it must be included as a factor is convincing. Thus, I find the evidence establishes the miner was afflicted with CWP.[21] The x-ray findings certainly corroborate this.

I find the claimant has met her burden of proof in establishing the existence of pneumoconiosis. *Director,*

OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

C. Cause of pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from

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[19] Cor pulmonale is defined as:
Right ventricular enlargement secondary to malfunction of the lungs, producing pulmonary artery hypertension that may be due to intrinsic pulmonary disease, and abnormal chest bellows or a depressed ventilatory drive. The term does not include right ventricle enlargement secondary to left ventricular failure; congenital heart disease, or acquired valvular heart disease. Cor pulmonale is usually chronic but may be acute and reversible...[T]he most common cause of chronic cor pulmonale is chronic obstructive pulmonary disease (chronic bronchitis, emphysema). Other causes include...diseases leading to diffuse interstitial fibrosis...Acute cor pulmonale usually results from massive pulmonary embolization, but acute reversible exacerbations of chronic cor pulmonale often occur in patients with COPD, usually during acute respiratory infections.
The Merck Manual, 16th Edition (1992) at 459.

[20] Dr. Scott's opinion is supported by his and Dr. Sagel's CT scan interpretation. However the Fourth Circuit has found a physician's opinion that inhalation of coal dust is not a cause, per se, of COPD, although it can aggravate COPD, "bizarre" in light of Congress'

explicit finding to the contrary. *Eagle v. Armco, Inc.*, 943 F.2d 509.511, n.2 (4th Cir. 1991) sighting 30 U.S.C. I 901(a), 902(b).

[21] The "legal" definition of pneumoconiosis is much broader than the medical definition which only encompasses lung diseases caused by fibrotic reaction of lung tissue to inhaled dust. *LaBelle Processing v Swarrow*, 72 F.3d 308 (3d Cir. 1995).

pneumoconiosis was employed for 10 years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Since the miner had ten years or more of coal mine employment, he receives the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. Nor does the record contain contrary evidence establishing the claimant's pneumoconiosis arose out of alternative causes. Although the record contains conflicting evidence concerning Mr. Ray's smoking history, it proves he was a heavy smoker for 20-30 years, not quitting until shortly before his death. Dr. Scott is the only physician in the 1990's, to attribute Mr. Ray's COPD solely to cigarette smoking. His opinion in unconvincing compared to the better reasoned opinions of Dr. Wald and another employer expert, Dr. Sinnenberg.

D. <u>Death due to Pneumoconiosis</u>

Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that death will be due to pneumoconiosis if any of the following criteria are met;

> (1) competent medical evidence established that the miner's death was due to pneumoconiosis; or
>
> (2) pneumoconiosis was substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or
>
> (3) the presumption of § 718.304 [complicated pneumoconiosis] is applicable.[22]

The Board concludes that the death must be "significantly" related to or aggravated by pneumoconiosis while the circuit courts have developed the "hastening death" standard which requires establishment of a lesser casual nexus between pneumoconiosis and the miner's death. *Foreman v. Peabody Coal Co.*, 8 B.L.R. 1-371, 1-374 (1985). The United States Court of Appeals for the Third Circuit has held that any condition that *hastens* the miner's death is a substantially contributing cause of death for purposes of § 718.205. *Lukosevicz v. Director, OWCP*, 888 F.2d 1001 (3d Cir. 1989).[23]

Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of

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[22] 20 C.F.R. § 718.205(c). Criterion (3) is not applicable in this case.

[23] The Fourth, Sixth and Seventh Circuits have adopted this position in *Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992). *cert. den.*,____U.S.____, 113 S.Ct. 969 (1993); *Brown v. Rock Creek Mining Corp.*, 996 F .2d 812 (6th Cir. 1993)(J. Batchelder dissenting); and *Peabody Coal Co. v. Director, OWCP,* 972 F.2d 178 (7th Cir. 1992).

Death. 20 C.F.R. § 718.205(c)(4). *Neeley v. Director, OWCP,* 11 B.L.R. 1-85 (1988) (survivor not entitled to benefits where the miner's death was due to a ruptured abdominal aortic aneurysm).

Dr. Mohan Patel, who signed the death certificate on April 19, 1996, listed the immediate cause of death as "end stage chronic obstructive lung disease" of "years" duration with other significant conditions listed as "CAD and HPN." (DX 12).[24]

The employer's experts, Drs. Scott and Sinnenberg, both found the cause of death totally unrelated to CWP or coal mine dust exposure. Dr. Scott found no relationship between the coal miner's coal dust exposure and his COPD or death. Dr. Sinnenberg admitted the miner probably had CWP, but that it was so slight that it could not have hastened, contributed to, or played any clinical significant role in his death. Dr. Wald thoroughly and convincingly explained how coal mine dust exposure was a cause, albeit not the primary one, of the miner's COPD and that COPD was the cause of death.

Since I have found the miner's COPD is related to his coal mine dust exposure, and thus constitutes CWP as defined by the Act and Regulations, and that COPD was the cause of his death, this element has been established.[25]

I find that the evidence establishes that pneumoconiosis was a substantially contributing cause of death. *Dillon v. Peabody Coal Co.*, 11 B.L.R. 1-113 (1988).

E. Date of entitlement

One is entitled to benefits as a child for each month beginning with the first month in which all the elements of entitlement are satisfied. 20 C.F.R. § 725.219(a). Ms. Ray is entitled to benefits as of April 1, 1996, the first day of the month of the miner's death.

F. Attorney fees

Thirty days is hereby allowed to the claimant's counsel for the submission of such an application. Counsel's attention is directed to 20 C.F.R. §§ 725.365-725.366. A service sheet showing that service has been made upon all the parties including the claimant, must accompany

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[24] A death certificate, in and of itself, is an unreliable report of the miner's condition, particularly when the record contains no indication the signor possessed any relevant qualifications or personal knowledge of the miner from which to assess the cause

of death. *Smith v. Camco Mining Inc.*, 13 B.L.R. 1-17 (1989) & *Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988). That is not the case here. Dr. Patel had treated Mr. Ray for nearly a decade.

[25] I note that the qualifying values of the Arterial Gas Studies and Pulmonary Function Studies establish the miner's total disability. Pulmonary function studies and blood gas studies are not diagnostic of the etiology of the respiratory impairment, but only of the severity of the impairment i.e., total disability. *Tucker v. Director, OWCP*, 10 B.L.R. 1-35 1-41 (1987). Although, the fact one is totally disabled by CWP does not mean death was caused by CWP, it is one factor to consider in assessing whether CWP contributed to a miner's death. *See, Usery, Secretary v. Turner Elkhorn Mining Co., et al*, 428 U.S. 1, 7, 96 S. Ct. 2882, 2888 (1976) n. 4. *(Director, OWCP, v. Mangifest*, 826 F.2d 1318. 1326 (3d. Cir. 1987), held that mere reference to the quality standards of a PFS is not sufficient. Those standards provide explicitly that non-qualifying test results shall not constitute evidence unless they are in substantial compliance with the standards. 20 C.F.R. § 718.103(c); *Twin Pines Coal Co. v. U.S. Department of Labor*, 854 F.2d 1212, 1217 n. 5 (10th Cir. 1988)(The PFS had neither the tracings or statements of cooperation and understanding and thus should not have been credited as a probative evidence in establishing total disability). *Siwiec* at 638- 9.)

the application. Parties have ten days following receipt of any such application within which to file any objections. The Act prohibits charging of a fee in the absence of an approved application.

CONCLUSIONS

In conclusion, the claimant has established that the miner had pneumoconiosis, as defined by the Act and Regulations and that the pneumoconiosis arose out of his coal mine employment. Likewise, the claimant has established that the miner's death was due to pneumoconiosis. She is therefore entitled to benefits.

ORDER

It is ordered that the claim of JUDY M. RICHARD on behalf of BARBARA A. RAY, Survivor or RALPH EDWARD RAY (Deceased) for benefits under the Black Lung Benefits Act is hereby GRANTED.

It is further ordered that the employer, Keystone Coal Mining Corp., shall pay to the claimant all benefits to which he is entitled under the Act commencing April 1, 1996.[26]

S

RICHARD A. MORGAN
Administrative Law Judge

RAM:DMR

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits review Board within 30 days from the date of this Order by filing a Notice of Appeal with the **Benefits Review Board, Attn: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of a Notice of Appeal must also be served on Donald S. Shire,

Esquire, Associate Solicitor for Black Lung Benefits, at the Frances Perkins Building, Room N-2605, 200 Constitution Avenue, N. W. Washington, D.C. 20210.

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[26] 20 C.F.R. § 725.530 (within 30 days of this order). In any case in which the fund has paid benefits on behalf of an operator or employer the latter shall simultaneously with the first payment of benefits to the beneficiary, reimburse the fund (with interest) for the full amount of such payments. 20 C.F.R. § 725.602(a).

Exh. #	Dates 1. x-ray 2. read	Physician	Qualifi-cations	Qual-ity	Classif-ication	Interpretation or Impression
DX 13	2/11/87 2/11/87	Bauer/Patel				Mild pulmonary fibrosis & emphysema. No other abnormality.
DX 11, 13	2/11/87 2/11/87	Forbes/Patel				Defects consistent with COPD. Mild pulmonary fibrosis & emphysema.
DX 34, 35, 38-	2/11/87 2/13/87	P. Wolfe	B; BCR		0/0	No CWP
DX 34, 38-	6/2/87 6/2/87	Harrison	BCR		1/0, p/s, 4LZ	Bilateral emphysematous changes.
DX 34, 38-	6/2/87 7/8/87	Sargent	B; BCR			No CWP. Atherosclerotic changes in aorta. Emphysema.
DX 35, 38-	3/4/88 4/11/88	Scott	B; BCI; BCP		0/0	Negative
DX 34, 38-	3/3/88 2/9/89	Fiehler	B; BCI; BCP		0/0	No CWP
DX 34, 38-	10/21/88	Palmer	B; BCR		0/1	
DX 35, 38-	10/21/88 10/21/88	Zuck	BCR		1/1, p	
DX 35, 38-	2/6/89 2/6/89	Connelly	Field reader		1/1, p	
DX 35, 38-	2/15/89 2/15/89	Simone	B; BCR			Negative. Hyperexpansion of lungs. Secondary to COPD.
DX 34, 38-	2/24/89	Simone/Bush				No CWP. Left upper lobe pulmonary nodule. 1.0 cm.
DX 13	2/22/95 2/23/95	D. Kalinowski/ Patel				Hyperinflated chest Changes of chronic lung disease & emphysema. Patchy densities right base & right upper lobe.

Exh. #	Dates 1. x-ray 2. read	Physician	Qualifi-cations	Qual-ity	Classif-ication	Interpretation or Impression
DX 13	3/29/96 3/29/96 3/29/96	E. R. Scheid/Patel				Scarring right base. Increased density left base. Pulmonary emphysema with chronic interstitial fibrosis. Increased density left lung most likely consistent with pneumonic infiltrate. Chronic fibrosis with scarring-suggestion of clearing previous atelectasis & infiltrate.
DX 13	4/3/96 4/3/96	Y. D. Kim				Increased density left lung base medially which may be pneumonic infiltrate. Pulmonary emphysema & chronic interstitial fibrosis.
DX 16, 35	4/3/96 9/17/96	Navani	B; BCR	2	1/1, s/p, 6LZ	Emphysema.
DX 13	4/8/96 4/8/96	D. Kalinowski				Chronic fibrosis & scarring. Emphysema & infiltrate. Increased density retrocardiac area improved suggesting clearing of atelectasis & infiltrate.
EX 5	4/8/96 9/27/97	Simone	B; BCR	2		No evidence of any rounded opacities to suggest CWP. Evidence of COPD & emphysema.
DX 13	4/11/96 4/11/96	Y. D. Kim				Pulmonary emphysema & COPD. No acute pneumonic infiltrate or CHF.
DX 17, 35	4/11/96 9/17/96	Navani	B; BCR	u/r		
DX 34, 35	4/11/96 12/31/96	Scott	B; BCI; BCP	u/r		
DX 13	4/15/96 4/16/96	Coella/Patel				Increased interstitial markings. Patchy density both lung bases.

Exh. #	Dates 1. x-ray 2. read	Physician	Qualifi-cations	Qual-ity	Classif-ication	Interpretation or Impression
DX 13	3/29/96 3/29/96 3/29/96	E. R. Scheid/Patel				Scarring right base. Increased density left base. Pulmonary emphysema with chronic interstitial fibrosis. Increased density left lung most likely consistent with pneumonic infiltrate. Chronic fibrosis with scarring-suggestion of clearing previous atelectasis & infiltrate.
DX 13	4/3/96 4/3/96	Y. D. Kim				Increased density left lung base medially which may be pneumonic infiltrate. Pulmonary emphysema & chronic interstitial fibrosis.
DX 16, 35	4/3/96 9/17/96	Navani	B; BCR	2	1/1, s/p, 6LZ	Emphysema.
DX 13	4/8/96 4/8/96	D. Kalinowski				Chronic fibrosis & scarring. Emphysema & infiltrate. Increased density retrocardiac area improved suggesting clearing of atelectasis & infiltrate.
EX 5	4/8/96 9/27/97	Simone	B; BCR	2		No evidence of any rounded opacities to suggest CWP. Evidence of COPD & emphysema.
DX 13	4/11/96 4/11/96	Y. D. Kim				Pulmonary emphysema & COPD. No acute pneumonic infiltrate or CHF.
DX 17, 35	4/11/96 9/17/96	Navani	B; BCR	u/r		
DX 34, 35	4/11/96 12/31/96	Scott	B; BCI; BCP	u/r		
DX 13	4/15/96 4/16/96	Coella/Patel				Increased interstitial markings. Patchy density both lung bases.

*A – A-reader; B- B-reader; BCR-Board-Certified Radiologist; BCP-Board-Certified Pulmonologist; BCI= Board-Certified Internal Medicine. Readers who are board-certified radiologists and/ or B-readers are classified as the most qualified. B-readers need not be radiologists.

** The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest x-ray classified as category 0, including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983)(Under part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*___ B.L.R.___ . BRB No. 94-3721 (June 19, 1997). If no categories are chosen in Box 2B (c) of the x-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

U. S. Department of Labor
Benefits Review Board
P. O. Box 37601
Washington, D.C. 20013-7601

BRB No. 98-1146-BLA

JUDY M. RICHARD
(on behalf of BARBARA A. RAY, Survivor of RALPH E. RAY)

Claimant-Respondent

v.

KEYSTONE COAL MINING CORPORATION

Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED:
May 21, 1999

DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care,) Greensburg, Pennsylvania, For claimant.

Hiliary S. Daninhirsch (Thompson, Calkin Sutter), Pittsburgh, Pennsylvania for employer.

Before: HALL, chief Administrative Appeals Judge **BROWN**, Administrative Appeals Judge and NELSON, acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0952) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act. of 1969, as amended, 30 U.S.C.§901 *et seq.* (the Act). The administrative law judge accepted the parties' stipulation to thirteen years of coal mine employment, determined that employer is the responsible operator, and found that Barbara A. Ray is the deceased miner's surviving disabled child. *See* 20 C.F.R. §§725.209(a)(2)(ii): 725.221. Upon consideration of the medical evidence, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), and concluded that pneumoconiosis caused or was a substantially contributing cause of the miner's death pursuant to 20 C.F.R. §718.205(c). the administrative law judge awarded benefits and employer bought this appeal.

On appeal, employer contends that the administrative law judge erred in his weighing of the medical evidence pursuant to Section 718.202(a) and Section 718.205(c). Claimant, by counsel, responds urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

A claimant becomes entitled to survivor's benefits by establishing that the miner had pneumoconiosis arising out of coal mine employment and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(a). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(1), (2), (4). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of death is it actually hastens the miner's death. *Lango v. Director, OWCP*, 104 F.3d 573, 576, 21 BLR 2-12, 2-18 (3d Cir. 1997); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100, 2-108 (3d Cir. 1989).

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[1]We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, dependency, and that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Coen v. Director, OWCP,* 7 BLR 1-30, 1-33, (1984); *Skrack v. Island Creek Coal Co.*,6 BLR 1-710, 1-711 (1983).

The threshold issue in a survivor's claim is whether the miner had pneumoconiosis as defined by the Act and regulations. *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201; *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85, 1-88 (1993). Although Section 718.202(a) provides four distinct methods of establishing pneumoconiosis, "all types of relevant evidence must be weighed together to determine whether the [miner] suffer[ed] from the disease." *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). The relevant evidence in this record consisted of x-ray readings, CT scan readings, examination and medical treatments reports, and consultation reports based on reviews of the miner's medical records.

Pursuant to Section 718.202(a)(1), the administrative law judge found the weight of the x-ray readings considered in light of the readers' radiological credentials to be negative for pneumoconiosis. Decision and Order at 4-5,14-15; *see Labelle Processing Co. v. Swarrow,* 72 F.3d 308, 310 n.3, 20 BLR 2-76, 2-280 n.3 (3d Cir. 1995). Additionally, the administrative law judge noted that a January 13, 1993 CT scan was read negative for pneumoconiosis.[2] Decision and Order at 11; Director's Exhibits 13,19,34. There was no biopsy or autopsy evidence. *See* 20 C.F.R. §718.202(a)(2).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the conflicting opinions of several physicians. The record of the miner's

lifetime claim, which denied by an administrative law judge in 1989, contained the reports of Drs. Eligator, Connelly, Cander, Bush, Scott, Tuteur, and Bajwa. Director's Exhibit 38. Dr. Eligator, whose credentials are not of record, examined the miner and diagnosed soft coal workers' pneumoconiosis and obstruction. Director's Exhibit 38. Dr. Cander, who is Board- certified in Internal Medicine, reviewed items of medical evidence and diagnosed chronic obstructive lung disease caused in part by coal dust inhalation. *Id.* Dr. Connelly, whose credentials are not of record, examined and tested the miner and diagnosed emphysema and coal workers' pneumoconiosis due to coal dust exposure. *Id.* Drs. Scott and Bush, who are Board-certified in Internal Medicine and Pulmonary Disease, examined and tested the miner and reviewed his medical records. Both concluded that the miner did not have pneumoconiosis but suffered from COPD due to smoking. *Id.* Dr. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed medical records and reached the same conclusion. *Id.* Dr. Bajwa, whose credentials are not of record, examined the miner and diagnosed COPD without addressing its etiology. *Id.*

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[2]In so doing, the administrative law judge properly considered the CT scan readings separately from the conventional chest x-rays. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991).

The administrative law judge evaluated these medical opinions on the basis of the physicians' qualifications and found that the weight of the opinions by physicians with superior credentials indicated that pneumoconiosis was not established as of the time their opinions were rendered. Decision and Order at 15-16. The

administrative law judge then turned to the more recent medical records submitted with the survivor's claim, which included hospitalization reports, office treatment notes, and the reports and testimony of Drs. Wald, Sinnenberg, and Scott.

Dr. Patel, the miner's treating physician during several hospitalizations from 1987 to 1996 reported that the miner was treated for pneumonia, bronchitis, respiratory failure and exacerbation of his COPD. Director's Exhibit 13. In the final hospitalization report included in this exhibit, Dr. Patel recorded that the miner died of respiratory failure on April 18, 1996. Director's Exhibit 13 at 1. Dr. Patel's office treatment notes contained multiple diagnosis of COPD, emphysema, hypertension, and coronary artery disease. Director's Exhibit 13, 14. Dr. Patel did not address the etiology of these diagnosis.

Dr. Wald who is Board-certified in Internal Medicine, reviewed the medical evidence of record and concluded that although the miner's chest x-rays and CT scan did not reveal clinical pneumoconiosis and his cigarette smoking habit was a major cause of his COPD, his coal mine dust exposure was nevertheless "a substantial factor in the progression" of his COPD. Claimant's Exhibits 1, 2. Accordingly, Dr. Wald opined that under the broader, legal definition of pneumoconiosis, the miner had "a respiratory problem that [was] related to his coal dust exposure. . . ." Claimant's Exhibit 2 at 33.

Dr. Sinnenberg, who is Board-certified in anatomical and Clinical Pathology, reviewed the medical evidence and opined that the miner might have had mild coal workers' pneumoconiosis, and that "a portion of Mr. Ray's bronchitis may have been industrial bronchitis caused by coal dust exposure during his years of working in the mine." Employer's Exhibits 3, 7. However, he insisted that the industrial bronchitis would have resolved after the

miner's retirement and removal from coal dust, and that the miner's emphysema was due to smoking. *Id.*

Dr. Scott, who is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader, reviewed the medical evidence of record and diagnosed COPD with emphysema due to smoking. Director's Exhibit 34. He opined that the miner did not have coal workers' pneumoconiosis or any occupational lung disease. *Id.*

The administrative law judge considered these opinions in light of the physicians' qualifications, and was persuaded by Dr. Wald's opinion that, while the x-rays and CT scans did not show clinical pneumoconiosis, the miner's COPD was aggravated by his coal dust exposure. Decision and Order at 16; *see* 20 C.F.R. §718.201; *see Swarrow* 72 F.3d at 312, 20 BLR at 2-84 (legal definition of pneumoconiosis is much broader than the medical definition). In crediting Dr. Wald's opinion, the administrative law judge permissibly criticized Dr. Scott for failing to account persuasively for the miner's exposure to coal dust. *See Peabody Coal Co. v. Hill,* 123 F.3d 412, 417 (6th Cir. 1997). Additionally, in the light of the progressive nature of pneumoconiosis, *see Swarrow,* 72 f.3d at 314, 20 BLR at 2-88-89, the administrative law judge reasonably accorded diminished weight to the medical opinions associated with the miner's claim diagnosing no pneumoconiosis as of the late 1980's. *See Kowalchick v. Director, OWCP,* 893 F.2d 615, 621, 13 BLR 2-226, 2-236-37 (3d Cir. 1990). Consequently, we reject employer's arguments that the administrative law judge erred by considering these factors at Section 718.202(a)(4) Section 718.205(c). [3] Employer's Brief at 10, 13-14.

However, employer correctly contends that the administrative law judge failed to weigh together all of the

evidence relevant to the existence of pneumoconiosis. Employer's Brief at 11; *see Williams, supra.* In finding the existence of pneumoconiosis established, the administrative law judge stated that "[t]he x-ray findings certainly corroborate this," but did not explain this comment. Further, he did not indicate how much weight, if any, he accorded to the negative CT scan ratings. Therefore, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis based on his findings at Section 718.202(a)(4). and remand the case to the administrative law judge for further consideration of the relevant evidence under Section 718.202(a) consistent with *Williams.*

Because the administrative law judge' finding at Section 718.202(a)(4) was determinative of his finding at Section 718.205(c) that pneumoconiosis caused the miner's death, [4] Decision and Order at 18, we must vacate the administrative law judge's finding at Section 718.205(c) and instruct him to reconsider this issue if he finds the existence of

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[3] We reject as meritless employer's argument that Dr. Wald's opinion should have been rejected as a legal opinion beyond his expertise simply because Dr. Wald addressed both clinical pneumoconiosis and pneumoconiosis as it is legally defined. Employer's Brief at 6.

[4] The miner's death certificate, completed by Dr. Patel, indicated that he died due to end stage chronic obstructive lung disease. Director's Exhibit 12. Drs. Wald, Sinnenberg, and Scott agreed that the miner died due to COPD. Director's Exhibit 34; Claimant's Exhibits 1, 2; Employer's Exhibits 3, 7.

Pneumoconiosis established on remand. For purposes of weighing the medical opinions on remand, the administrative law judge is advised that Dr. Wald is Board-certified in Internal Medicine, but does not hold similar, official credentials in pulmonary medicine as stated and apparently relied upon by the administrative law judge. Decision and Order at 16; Claimant's Exhibit 2 at 26, and Deposition Exhibit A.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

S

JAMES F. BROWN
Administrative Appeals Judge

S

MALCOLM D. NELSON,
Acting, Administrative Appeals Judge
U. S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center – Room 290

Pittsburgh, PA 15220

(412) 644-5754
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In the Matter of:

JUDY M. RICHARD On Behalf of BARBARA A. RAY, Survivor of RALPH EDWARD RAY (Deceased)
Claimant

v.

KEYSTONE COAL MINING CORP.,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS (OWCP),
Party-in-Interest

DATE ISSUED:
Aug. 31, 1999

Case No. 1997-BLA-952

DECISION AND ORDER ON REMAND AWARDING BENEFITS

PROCEDURAL BACKGROUND[1]

On April 21, 1998, I issued a Decision and Order Awarding Benefits ("D & O"), under the Black Lung Benefits Act, 30 U.P.S.C. § 901 *et seq.* ("Act"), in the

above-styled case. The employer appealed to the Benefits Review Board ("Board"). On May 21, 1999, the Board affirmed my D & O in part, vacated it in part and remanded for further consideration. (BRB No. 98-1146 BLA). I received the record on July 27, 1999.

The Board affirmed my finding that the coal workers' pneumoconiosis ("CWP" or "pneumoconiosis") was not established under 20 C.F.R. § 718.202(a)(1)-(3). However, the Board accepted the employer's argument that the administrative law judge had not weighed together all of the evidence relevant to the existence of pneumoconiosis, under *Penn Allegheny Coal Co. v. Williams & Director, OWCP,* 114 F.3d 22 (3d Cir June 3, 1997)(hereinafter "*Williams*"). The Board stated the judge had not explained his comment that "[t]he x-ray findings certainly corroborate this (i.e., the existence of CWP)." The Board reported the judge

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[1]The procedural history of the claim is set forth in detail in the D & O of April 21, 1998 and the Board's decision.

had not indicated how much weight, if any, he accorded the CT scan readings. Further, since the finding regarding the existence of CWP was determinative of the findings under 20 C.F.R. § 718.205(c), the Board vacated the latter finding. The Board remanded with instructions to:

1. Reconsider the relevant evidence, under section 718.202(a), consistent with *Williams;* and,

2. Reconsider the findings, under section 718.205(c), if CWP is found established.

In *Williams,* the Third Circuit Court of Appeals held that the four methods of establishing the existence of the

disease, provided in 20 C.F.R. § 718.202, are not to be considered in the disjunctive; that is, relevant evidence developed under the four methods of proof are to be considered together to determine whether a claimant has pneumoconiosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

A. Existence of Pneumoconiosis

There is no evidence of complicated pneumoconiosis in the case nor was biopsy or autopsy evidence submitted. As the Board observed, most of the x-ray evidence was negative for CWP. In fact, I found only two x-rays, i.e., 10/21/88 and 4/3/96, of the twenty-one x-rays "positive" for CWP. The January 13, 1993, CT Scan was read negative for CWP. Five physicians, Drs. Eligator, Cander, Connelly, Wald and Sinnenberg, diagnosed CWP, either "clinical" CWP or afflictions constituting CWP, under the Act and regulations, i.e., COPD and emphysema due to coal dust exposure. Three physicians, Drs. Scott, Bush, and Tuteur, found no CWP and diagnosed COPD and or emphysema solely from cigarette smoking. Although Drs. Bajwa and Patel diagnosed either COPD or emphysema or both, they failed to report the etiology of the afflictions.

In my D & O, I concluded the pre-1990 medical opinions did not establish "clinical" CWP. The 10/21/88 x-ray was only one of nine x-rays taken between 1987 and 1990 which I found positive. However, both the pre-1990 x-rays and doctors' opinions conclusively establish the diagnosis of COPD and emphysema. Before 1990, three Board-certified internists with sub-specialties in pulmonary medicine reported the COPD arose solely from the miner's cigarette smoking. One Board-certified internist, Dr. Cander attributed the miner's COPD to coal mine dust exposure, Drs. Eligator and Connelly, whose credentials were unknown, attributed the CWP and emphysema to coal

dust exposure. Post 1990, only Dr. Wald, a Board-certified internist attributed the miner's COPD in part to coal dust exposure. Internist Scott and pathologist

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[2]I incorporate my previous factual findings except insofar as they are inconsistent with the opinion of the Board or more specific findings set forth herein.

Sinnenberg attributed the COPD solely to cigarette smoking. Dr. Wald admitted that a susceptible individual with a smoking history similar to Mr. Ray's and absent coal dust exposure could develop the disease and pulmonary function abnormalities seen in Mr. Ray. (TR42).

I found only one of the thirteen post-1990 x-rays positive for CWP; that of 4/3/96. This x-ray was taken shortly before the miner's death and read by a Board-certified radiologist and B-reader, Dr. Navani. This reading is uncontradicted and somewhat corroborated by the reading of the same x-ray by Dr. Kim, whose credential are unknown. The remaining post-1990 x-rays confirmed the COPD and emphysema diagnoses as well as revealing interstitial fibrosis. Because, as Dr. Wald pointed out without contradiction, emphysema may mask the findings of CWP on x-ray, I am not persuaded the majority of negative readings preclude finding the existence of CWP. The expert reviews of the 1993 CT scan showed no clinical CWP or interstitial fibrosis, but did confirm the diagnosis of emphysema (centrilobular emphysema related to smoking). This CT was taken about three and a quarter years before the miner's death.

Dr. Patel, who treated the miner from 1987-1996 and signed his death certificate, on April 19, 1996, had consistently diagnosed COPD, emphysema, and cor pulmonale, As I previously observed, cor pulmonale is an established indicator of the presence of SWP. *Christian v.*

Monsanto Corp., 12 B.L.R. 1-56, 1-58 (1988). Dr. Patel listed "end-stage COPD" as the cause of death. Dr. Edwin Rao's (a pulmonary consultant) April 16, 1996 assessment, included cor pulmonale, respiratory failure, end-state COPD, and silicon and coal exposure.

Considering all the relevant evidence developed under the four methods of proof together to determine whether a claimant has pneumoconiosis, I find CWP established. The miner's COPD was caused in part by his coal mine dust exposure. My earlier comment concerning the corroboration by x-ray evidence in artfully referred to the fact that COPD had been established by x-ray evidence, thus corroborating the existence of COPD caused in part by coal mine dust exposure. Employer-pathologist Sinnenberg's 1997 probable "clinical" CWP diagnosis is lent support by the two earlier CWP diagnoses of Drs. Eligator, and Connelly and Dr. Wald's testimony that it is an insidious process.

As I previously observed, I discounted Dr. Scott's opinion limiting the etiology of the COPD to smoking because, while he reviewed a multitude of facts, he did not give satisfactory and legitimate reasons why the miner's thirteen years of coal dust exposure played no role in his COPD.[3] Dr. Sinnenberg's opinion that smoking is the major cause of COPD is not disputed. However, Dr. Wald convincingly opined that one cannot separate the etiologies of COPD, i.e.,

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[3] Unlike Dr. Sinnenberg, who admitted the miner may have had industrial bronchitis," Dr. Scott did not admit the miner could have suffered from industrial bronchitis. 4A GORDY-GRAY, ATTORNEYS' TESTBOOK OF MEDICINE (3rd Ed., 1987) § 204.03("The symptoms of

industrial bronchitis differ in no way from those seen in chronic bronchitis due to cigarette smoking.")

due to smoking or coal dust exposure.[4] (TR 47). He pointed out that since chronic bronchitis, a progressive disease, is a chronic irritation to the bronchial tubes that all irritants to which one is chronically exposed must be considered, i.e. both cigarettes and coal dust. (TR 43-44, 49). These facts, coupled with Dr. Sinnenberg's concession that the miner probably had mild CWP, persuades me that the claimant has established the existence of CWP, by a preponderance of the evidence.

B. Death due to Pneumoconiosis

Dr. Mahan Patel, who signed the miner's death certificate, had treated the miner for nearly a decade. Thus, despite the absence of his credentials from the record I give his opinion great weight. He listed the immediate cause of death as "end stage chronic obstructive lung disease" of "years" duration. (DX 12). Other significant conditions listed were "CAD and HPN". Dr. Wald found the cause of death was respiratory failure. He opined that while Mr. Ray's cigarette smoking played a (definite and predominant) contributing role in his COPD, his coal dust exposure was a substantial contributing "factor in the progression of the disease state to the point of ultimate demise." Dr. Wald, while agreeing with much of Dr. Sinnenberg's opinion, explicitly disagreed with Dr. Sinnenberg's opinion that Mr. Ray's seventeen years of coal mine employment played no role in his disease. "Anything that causes a progression of this disease state would be responsible for shortening his life," according to Dr. Wald.)TR 57). He added that the miner's hypertension and CAD, although significant, were not substantial factors in his demise.

As I previously observed, the employer's experts, Drs. Scott and Sinnenberg, both found the cause of death totally unrelated to CWP or coal mine dust exposure. Dr. Scott found no relationship between the miner's coal dust exposure and his COPD or death. However, he admitted COPD and emphysema contributed to Mr. Ray's death. Because Dr. Scott did not believe Mr. Ray's COPD could have been caused in any part by occupational exposure I discount his opinion concerning cause of death. As discussed above in finding the existence of CWP, I was convinced it is more likely than not that Mr. Ray's occupational exposure did contribute in small part to his COPD.

Dr. Sinnenberg admitted the miner probably had CWP, but that it was so slight that it could no have hastened, contributed to, or played any clinically significant role in his death. However, Dr. Sinnenberg admitted the cause of death was exacerbation of COPD causing respiratory failure. Dr. Sinnenberg disagreed with Dr. Wald's conclusion that coal dust exposure irreversibly aggravated Mr. Ray's chronic bronchitis which produced a lasting effect on his pulmonary status. Dr. Wald thoroughly and convincingly explained how coal mine dust

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[4] "These differences (reduced FEV1) are only evident to nonsmokers, as the effects of cigarette smoking completely overwhelm and obscure those due to dust exposure…[T]he effect of industrial bronchitis on the ventilator capacity has been calculated to be about one tenth to one twentieth that of cigarette smoking." 4A GORDY-GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE (3rd Ed., 1987) § 205B.80.

exposure was a cause, albeit not the primary one, of the miner's COPD and that COPD was the cause of death. The final resolution of the matter hinges upon which of two doctors to believe, Dr. Wald or Dr. Sinnenberg.

While both physicians have factual support for their positions, I am convinced by Dr. Wald's opinion. I find it more credible because of his dealings with living patients who have CWP, the fact Dr. Sinnenberg had no anatomical evidence to add credence to his opinion, the fact that it rationally accounts for the impact of the miner's many years of coal mine employment, the fact it is in accord with the learned treatise I have cited, and the other reasons referred to herein.

Since all the physicians who commented on the cause of death agreed that COPD, which included an element of emphysema, caused the miner's death, and I have found that the COPD was caused in part by the miner's coal dust exposure, I find that coal workers' pneumoconiosis, as defined by the Act and regulations, was the cause of the miner's death.

C. Date of Entitlement

Entitlement to benefits is established effective April 1, 1996, the first day of the month of the miner's death.

ATTORNEY FEES

Thirty days is hereby allowed to the claimant's counsel for the submission of such an application. Counsels' attention is directed to 20 C.F.R. §§ 725.365 – 725.366. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany the application. Parties have fifteen days following receipt of any such application within which to file any objections.

The Act prohibits charging of a fee in the absence of an approved application.

CONCLUSIONS

In conclusion, the claimant has established that the miner had pneumoconiosis, as defined by the Act and regulations and that the pneumoconiosis arose out of his coal mine employment. The evidence establishes that the miner's death was due to pneumoconiosis. The claimant is therefore entitled to benefits.

ORDER

It is ordered that the claim of JUDY M. RICHARD on Behalf of BARBARA A. RAY, Survivor of RALPH EDWARD RAY (Deceased) for benefits under the Black Lung Benefits Act is hereby GRANTED.

It is further ordered that the employer, Keystone Coal Mining Corp., shall pay to the claimant all benefits to which she is entitled under the Act commencing April 1, 1996.[5]

S

RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits review Board within 30 days from the date of this Order by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.** A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits at the Frances Perkins Building, room N-

2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

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[5] 20 C.F.R. § 725.530 (within 30 days of this order). In any case in which the fund has paid benefits on behalf of an operator or employer, the latter shall simultaneously with the first payment of benefits to the beneficiary, reimburse the Fund with interest for the full amount of all such payments. 20 C.F.R. § 725.602(a).

U. S. Department of Labor
Benefits Review Board
P. O. Box 37601
Washington, DC 20013-7601

BRB No. 00-0152 BLA

JUDY M. RICHARD
(o/b/o BARBARA
A. RAY, surviving child
of RALPH EDWARD
RAY, SR.)

Claimant-Respondent

v.

KEYSTONE COAL
MINING
CORPORATION
Employer-Petitioner

DIRECTOR, OFFICE
OF WORKERS'
COMPENSATION
PROGRAMS, UNITED
STATES DEPARTMENT
OF LABOR
Party-in-Interest

DATE ISSUED:
Jan. 29, 2001

DECISION and ORDER

Appeal of the Decision and Order On Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Hilary S. Daninhirsch (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-BLA-0952) of Administrative law Judge Richard A. Morgan awarding benefits on a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case is before the Board for the second time.[2] In his Decision and Order on Remand, the administrative law judge found the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a) and death due to pneumoconiosis established pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a) and death due to pneumoconiosis established pursuant to Section 718.205(c). Claimant

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[1]This survivor's claim was filed on May 17, 1996, Director's Exhibit 1, by Judy M. Richard on behalf of Barbara A. Ray, as a surviving disabled child of the miner, Ralph E. Ray, Sr., who died on April 18, 1996, Director's Exhibit 12. the miner had filed a claim on April 1, 1987, which was ultimately denied in a Decision and order issued on June 2, 1989, by Administrative law Judge Michael C.

Colligan, who found that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) (1)-(4). No further action was taken by the miner on his claim and it is not at issue herein.

[2] Originally, in a Decision and Order issued on April 21, 1998, the administrative law judge found at least thirteen years of coal mine employment established, as stipulated by the parties, and adjudicated this survivor's claim under 20 C.F.R., Part 718. the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and found death due to pneumoconiosis established pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Employer appealed and the Board initially affirmed the administrative law judge's findings that the existence of pneumoconiosis was not demonstrated pursuant to 20 C.F.R. §718.202(a)(1)-(3) as unchallenged. *Richard v. Keystone Coal Mining Corp.*, BRB No. 98-1146 BLA (May 21, 1999)(unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because the administrative law judge did not weigh together all of the evidence relevant to the existence of pneumoconiosis under Section 718.202(a) in accordance with the holding of the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, in *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22,25,21 BLR 2-104, 2-111 (3d Cir. 1997). Thus, the Board remanded the case for further consideration. Finally, because the administrative law judge' finding at Section 718.202(a)(4) was determinative of his finding at Section 20 C.F.R. §718.205(c) that pneumoconiosis caused the miner's death, the Board vacated the administrative law judge's finding at Section 718.205(c) and instructed him to reconsider this issue if he

found the existence of pneumoconiosis established on remand.

Responds, urging that the administrative law judge's Decision and Order On Remand awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, arc rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S..C. §921(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement on the basis of this survivor's claim, which was filed after January 1, 1982, and in which the miner had not been awarded benefits prior to his death on a claim filed prior to January 1,1982, *see* 30 U.S.C. §§901, 932(1); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989), claimant must establish the existence of pneumoconiosis, *see* 20 C.F.R.§718.202; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director. OWCP*, 11- BLR 1-85 (1988), [3] and that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.1; 718.205(c); *Neeley, supra; cf. Smith, supra*, which arose out of coal mine employment, *see* 20 C.F.R. §718.203; *Boyd v. Director OWCP*, 11 BLR 1-39 (1988). Moreover, the United State of Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that, pursuant to Section 718.205(c)(2), pneumoconiosis substantially contributes to death if it hastens the miner's death, *see Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

Initially, the Third Circuit has held that "all types of relevant evidence must be weighed together" in determining whether claimant has met her burden of establishing the existence of pneumoconiosis pursuant to Section 718.202, *see Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). The administrative law judge considered all of the relevant evidence of record pursuant to Section 718.202(a) and found that while the medical opinion evidence submitted with the miner's claim and the x-ray and CT scan evidence of record did not establish "clinical" pneumoconiosis or coal workers' pneumoconiosis, it did establish chronic obstructive pulmonary disease (COPD)

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[3] The presumptions at Section 411(c)(2) of the Act, 30 U.S.C. §921(c)(2), as implemented by 20 C.F.R. §718.303, at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, and at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, are inapplicable to this survivor's claim filed after January 1, 1982, *see* 20 C.F.R. §§718.303(c), 718.305(a), (e), 20 C.F.R. §718.306(a); Director's Exhibit 1.

and emphysema, Decision and Order On Remand at 2-4. the administrative law judge also considered the medical opinion evidence submitted with the survivor's claim, which included the opinion of Dr. Wald. Dr. Wald, who is board-certified in internal medicine reviewed the evidence of record and concluded that, while the evidence did not reveal clinical pneumoconiosis and indicated that smoking was a major cause of the miner's COPD, coal mine dust exposure was also "a substantial contributing factor" in the progression of the miner's COPD and emphysema, which shortened his life and caused his death, Claimant's

Exhibits 1, 2. On the other hand, Dr. Sinnenberg, board-certified in anatomical and clinical pathology, reviewed the evidence and found that the miner probably had mild coal workers' pneumoconiosis, but the miner's COPD and emphysema were due to smoking which caused the miner's death, Employer's Exhibits 3-4, 7.[4] Finally, a CT scan was reviewed by Dr. Sagel, a board-certified-radiologist, who found no evidence of pneumoconiosis or coal workers' pneumoconiosis, but emphysema undoubtedly related to smoking, Director's Exhibit 19.

The administrative law judge found evidence established that the miner's COPD was caused in part by his coal dust exposure, *i.e.,* the definition of pneumoconiosis as more broadly defined by the Act and the regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201. The administrative law judge found Dr. Wald's opinion convincing and corroborated by the x-ray evidence, to the extent that it also confirmed the diagnosis of COPD and/or emphysema. The administrative law judge also noted that the CT scan also confirmed the diagnosis of emphysema, while further noting that it had been related to smoking. The administrative law judge stated that he was not persuaded that the negative x-ray evidence precluded finding coal workers' pneumoconiosis established because De. Wald stated, without contradiction in the record, that emphysema may mask findings of coal workers' pneumoconiosis on x-ray. In addition, the administrative law judge noted that claimant's treating physician, Dr. Patel, Director's Exhibit 14, as well as Dr. Rao, Director's Exhibit 15, had diagnosed "cor pulmonale," which the administrative law judge stated has been held to be an indicator of coal workers' pneumoconiosis. The administrative law judge found that Dr. Sinnenberg's opinion that the miner's COPD was due to smoking is not disputed. Nevertheless, the administrative law judge noted that Dr. Sinnenberg also conceded that the miner probably

had mild coal workers' pneumoconiosis, which the administrative law judge

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[4] The administrative law judge again, as previously affirmed by the Board, discounted Dr. Scott's opinion, Director's Exhibit 34, that claimant did not have coal workers' pneumoconiosis or occupational lung disease and that his COPD and emphysema were due solely to smoking as he did not account for the miner's exposure to coal dust, *see Richard,* BRB No. 98-1146 BLA at 5.

found was supported by the opinions from the miner's claim from Drs. Eligator and Connelly, Director's Exhibit 38, who both diagnosed coal workers' pneumoconiosis and emphysema and/or obstruction due to the miner's coal dust exposure. Thus, the administrative law judge ultimately credited Dr. Wald's opinion that coal mine dust exposure was also "a substantial contributing factor" in the miner's COPD.

Initially, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a) based on what employer characterizes as the "equivocal" opinion of Dr. Wald. Specifically employer contends that the administrative law judge erred in relying on Dr. Wald's statement that emphysema "may" mask findings of coal workers' pneumoconiosis on x-ray in support of the administrative law judge's finding that the existence of pneumoconiosis was established, because Dr. Wald did not testify with a reasonable degree of medical certainty that "clinical" pneumoconiosis was present.

Contrary to employer's contention the administrative law judge did not rely on Dr. Wald's statement that emphysema "may" mask findings of coal workers' pneumoconiosis on x-ray as affirmative evidence of the

existence of pneumoconiosis. Rather, in weighing together all of the evidence relevant to the existence of pneumoconiosis under Section 718.202(a) on remand as required by the Third Circuit in *Williams, supra,* and in accordance with the Board's previous remand instructions, the administrative law judge held that in light of Dr. Wald's uncontradicted statement, he was not persuaded by the majority of negative x-ray readings. This is a rational and proper weighing of the evidence consistent with the standard enunciated in *Williams.* Moreover, as opposed to being inconsistent with a finding that pneumoconiosis was not established by the x-ray or medical evidence, Dr. Wald's statement offers an explanation for his conclusion taking into consideration the x-ray evidence which is overwhelmingly negative for the existence of pneumoconiosis.

Nevertheless, the administrative law judge did not follow the board's previous remand instructions and indicate how much weight he accorded the negative CT scan readings, *see Hall v. Director, OWCP,* 12 BLR 1-80, 1-82 (1988). Dr. Sagel found no evidence of coal workers' pneumoconiosis or clinical pneumoconiosis on the miner's CT scan, but emphysema undoubtedly related to smoking, Director's Exhibit 19. Such a discussion is critical in this case since a majority of the x-ray evidence, as well as some of the medical reports, are also negative for the existence of pneumoconiosis, *see Hall, supra.*

In addition, as employer contends, the administrative law judge erred in finding that the diagnosis of "cor pulmonale" by Drs. Patel and Rao as an indicator of coal workers' pneumoconiosis. In support of the administrative law judge's holding that cor pulmonale

is an established indicator of the presence of clinical coal workers' pneumoconiosis, the administrative law judge cites to the Board's holding in *Christian v. Monsanto*

Corp., 12 BLR 1-56, 1-58 (1988). A review of the holding in *Christian*, however, does not provide a statutory or regulatory basis for the administrative law judge's conclusion.[5] Consequently, in considering the diagnosis of "cor pulmonale" by Drs. Patel and Rao on remand, the administrative law judge should provide an evidentiary basis for a finding that cor pulmonale is an indicator of the presence of pneumoconiosis.[6]

The administrative law judge also provides no basis or reason for crediting the opinions from the miner's claim of Drs. Eligator and Connelly as supporting Dr. Sinnenberg's opinion from the survivor's claim that the miner probably had mild "clinical coal workers' pneumoconiosis. As employer contends, an explanation of the weight given to the opinions from the miner's claim of Drs. Eligator and Connelly is especially necessary in light of the administrative law judge's inconsistent finding that the medical opinion evidence from the miner's claim was insufficient to demonstrate pneumoconiosis, *see Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *see also Wike v. Bethlehem Mines corp.*, 7 BLR 1-593 (1984).

Finally, employer contends that the administrative law judge erred in relying on a medical treatise that was not a part of the record under Section 718.202 and in order to credit Dr. Wald's opinion in finding death due to pneumoconiosis established pursuant to 718.205(c) and, thereby, substituted his own opinion over Dr. Sinnenberg's opinion.[7] In

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[5] In *Christian v. Monsanto Corp.*, 12 BLR 1-56, 1-58 (1988), the Board merely noted that cor pulmonale "may be" indicative of the existence of pneumoconiosis, citing to *Gilson v. Price River Coal Co.*, 6 BLR 1-96 (1983), which in turn cites to the definition of pneumoconiosis at 20 C.F.R. §727.202 and to *Makowski v. Director, OWCP*, 10

BRBS 456, 459, 2 BLR 1-363, 1-366 (1979). Neither the regulations nor *Makowski,* however, support the proposition that cor pulmonale is an indicator of the existence of pneumoconiosis absent a finding that the cor pulmonale is significantly related to, or substantially aggravated by, dust exposure in coal mine employment, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201.

[6] Contrary to employer's contention, however, cor pulmonale must be associated with right-sided congestive heart failure in order to demonstrate total disability, as opposed to the existence of pneumoconiosis, *see* 20 C.F.R. §718.204(c)(3).

[7] Pursuant to Section 718.203(c), the administrative law judge initially gave great weight to the opinion of Dr. Patel as the miner's treating physician, who attributed the miner's death to "end-stage" chronic obstructive lung disease, Director's Exhibit 12.

weighing the medical opinion evidence under Section 718.202, the administrative law judge cited a treatise stating that the symptoms of industrial bronchitis are no different than those of chronic bronchitis due to smoking and that the effects of smoking obscure those due to dust exposure, *see* 4A *Gordy-Gray, Attorney's Textbook of Medicine* (3rd Ed., 1987) §205B.80; Decision and Order On Remand at 3 n. 3, 4 n. 4. Moreover, the administrative law judge found Dr. Wald's opinion more credible than Dr. Sinnenberg's contrary opinion under Section 718.205(c), in part, because Dr. Wald's opinion was in accord with the medical treatise cited by the administrative law judge, Decision and Order On Remand at 5.

An administrative law judge may take judicial notice of a fact if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.,* 14

BLR 1-135 (1990). Thus, the administrative law judge did not take proper judicial notice of the treatise he relied on under Sections 718.202 and 718.205(c), inasmuch as the administrative law judge did not give employer adequate notice and/or an opportunity to respond, *see Maddaleni supra.* Moreover, as employer contends, the administrative law judge's according of great weight to Dr. Patel's opinion under Section 718.205(c) as the miner's treating physician is inconsistent with the administrative law judge's original Decision and Order in which he gave lesser weight to Dr. Patel's opinion as his qualifications were unknown, *see Revnack, supra; see also Wike, supra.*

Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a) and remand the case for

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Decision and Order On Remand at 4-5. The administrative law judge noted that Dr. Wald found that coal mine dust exposure was "a substantial contributing factor" in the progression of the miner's COPD to the point of death and shortened his life, Claimant's Exhibit 1, 2, whereas Dr. Sinnenberg, a pathologist, found that the miner's death was caused by his COPD which he attributed solely to smoking, Employer's Exhibits 3-4, 7. the administrative law judge found Dr. Wald's opinion more credible than Dr. Sinnenberg's opinion because of his prior experience with patients with coal workers' pneumoconiosis, because there was no anatomical evidence for Dr. Sinnenberg to review to add credence to his opinion, because Dr. Wald rationally accounted for the impact of the miner's many years of coal mine employment. Inasmuch as all of the relevant medical opinions attributed the cause of the miner's death to his

COPD, which the administrative law judge found death due to pneumoconiosis established.

reconsideration of all relevant evidence, *see Williams, supra.* Moreover, inasmuch as the administrative law judge erred in his weighing of the relevant medical opinion evidence under Section 718.205(c) and inasmuch as the administrative law judge's finding at Section 718.202(a) is determinative of his finding at Section 718.205(c), *see Trumbo, supra; Neeley, supra,* the administrative law judge's finding at Section 718.205(c) is also vacated.[8] If the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a) on remand, he should then reconsider whether death due to pneumoconiosis is established pursuant to Section 718.205(c).

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[8] Employer also contends that the administrative law judge's finding that the miner's COPD was caused, in part, by his coal dust exposure under Section 718.202(a) is insufficient to support a finding that the miner's coal dust exposure "substantially contributed" to the miner's death pursuant to Section 718.205(c). Contrary to employer's contention, pneumoconiosis substantially contributes to death if it hastens the miner's death under Section 718.205(c)(2), *see Lukosevicz, supra.* The administrative law judge relied on Dr. Wald's opinion that the miner's

coal dust exposure was a substantial contributing factor in the his COPD and "shortened his life," Claimant's Exhibit 2 at 57. Although employer contends that the administrative law judge did not account for the role of the miner's smoking in his death, the administrative law judge credited Dr. Wald's opinion, who found that the miner's death was due to his COPD and emphysema which he attributed predominantly to the miner's smoking, as well as his coal dust exposure, *see* Claimant's Exhibit 2 at 19. Thus, inasmuch as Dr. Wald believed that the miner's coal dust exposure "shortened his life," Dr. Wald's opinion is sufficient, if credited on remand, to establish death due to pneumoconiosis under Section 718.205(c) in accord with the standard enunciated in *Lukosevicz.*

Accordingly, the administrative law judge's Decision and Order On Remand awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

S
BETTY JEAN HALL, Chief
Administrative Appeals Judge

S
ROY P. SMITH
Administrative Appeals Judge

S
MALCOLM D. NELSON,
Acting Administrative Appeals
Judge

U. S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center – Room 290
Pittsburgh, PA 15220

(412) 644-5754
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Issue Date: 11 August 2003

CASE NO. 1997-BLA -952

In the Matter of:

JUDY M. RICHARD, On Behalf of
BARBARA A. RAY, Survivor of
RALPH EDWARD RAY (Deceased),
Claimant

v.

KEYSTONE COAL MINING CORP.,
Employer

And

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

David A. Colecchia, Esquire
For the Claimant

Gregory J. Fischer, Esquire
For the Employer

Before: RICHARD A. MORGAN
Administrative law Judge

DECISION AND ORDER ON SECOND REMAND – DENYING BENEFITS

This matter is before the Office of Administrative Law Judges on second remand pursuant to the Benefits Review Board's Decision and Order, dated January 29, 2001 (BRB No. 00-0152 BLA); the Order of the U.S. Court of Appeals for the Third Circuit, dated July 23, 2001, dismissing Claimant's appeal therefrom; and, the Board's Memorandum, dated January 13, 2003, forwarding the official record, which had been returned by the Third Circuit to the Board, to the Office of Administrative law Judges.

Procedural History

On April 1, 1987, Ralph E. Ray, Sr. (a/k/a Ralph Edward Ray), a former coal miner, filed an application for black lung benefits under the Act (DX 38). Following a formal hearing before Administrative Law Judge Michael Colligan on March 8, 1989, Judge Colligan issued a Decision and Order-Denying Benefits, dated June 2, 1989. In summary, the uncontested and/or stipulated finding were as follows: the miner's claim was timely filed; Mr. Ray was a miner within the meaning of the Act and regulations; Keystone Coal Mining Corp. was the properly designated responsible operator; and Mr. Ray had engaged in coal mine employment for at least 13 years ending on February 10, 1987. the primary contested issues were whether the miner had pneumoconiosis; whether the miner's pneumoconiosis, if found, arose out of coal mine employment; whether the miner was totally disabled; and, whether the miner's disability was due to pneumoconiosis (DX 38).

In his Decision and Order-Denying Benefits (DX 38), Judge Colligan summarized the miner's testimony regarding his coal mine employment, which was all underground, and regarding his progressively worsening breathing problems, which began in 1980. Furthermore, Judge Colligan stated that the miner had "testified that he smoke about one pack of cigarettes for ten to twelve years, but stopped around 1978 or 1980."[1] Regarding the merits of the claim, Judge Colligan analyzed numerous x-ray interpretations of films, taken between February 1987 and February 1989, and found that the preponderance of such evidence was negative for pneumoconiosis. He also noted that there was no biopsy evidence and there were no applicable presumptions. Finally, Judge Colligan weighed the medical opinion evidence. In summary, Judge Colligan stated that three physicians (*i.e.* Drs. Scott, Tuteur, Bush, and Bajwa). Of the three physicians who diagnosed pneumoconiosis, only Dr. Cander's credentials were in evidence, and showed that he is Board-certified in Internal Medicine. On the other hand, of the four physicians who did not find pneumoconiosis, only Dr. Bajwa's credentials were not in the record. Moreover, Drs. Scott, Tuteur, and Bush were all Board-certified in Internal Medicine and Pulmonary Diseases. In view of the foregoing, Judge Colligan stated; "After weighing this evidence I find that a preponderance of the better qualified physicians are all of the opinion that the Claimant [Ray E. Ray] does not suffer from pneumoconiosis." In conclusion, Judge Colligan noted that the existence of pneumoconiosis was a prerequisite to recovery of benefits under the Act; and, having failed to establish pneumoconiosis, the miner was not entitled to benefits (DX 38, ALJ Colligan Decision and Order). Since Mr. Ray did not appeal or take any further action regarding the foregoing claim, it is deemed finally denied and administratively closed.

On April 18, 1996, Ralph E. Ray, Sr. (a/k/a Ralph Edward Ray), passed away (DX 12). Shortly thereafter, on

May 17, 1996, the Claimant, Judy M. Richard, filed the current survivor's claim, on behalf of her sister, Barbara A. Ray, the disabled dependent child of the deceased miner (DX 1,2,10). This survivor's claim was initially granted by the District Director's office on October 9, 1996 (DX 27);

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[1] Although this accurately reflects the miner's testimony at the formal hearing on March 8, 1989, I find that it grossly understates the miner's actual cigarette smoking history, as discussed herein (DX 38, 3/8/89-Hearing TR 28-30).

however, on February 6, 1997, the District Director issued a Proposed Decision and order denying benefits on the grounds that the miner's death was not due to pneumoconiosis (DX 35).

Following a formal hearing before the undersigned on December 18, 1997, I issued a Decision and Order Awarding Benefits, dated April 21, 1998. On appeal, the Benefits Review Board issued a Decision and Order, dated May 21, 1999, in which my initial Decision and order was affirmed in part, vacated in part, and remanded for further consideration. Subsequently, I issued a Decision and Order on Remand Awarding Benefits, dated August 31, 1999, in which I sought to address the problems raised by the Board. However, on Employer's second appeal, the Benefits Review Board issued a Decision and Order, dated January 21, 2001, in which the Board found some of my analysis inadequate and, therefore, vacated the Decision and Order on Remand. As stated above, claimant, then, appealed the Board's Decision and Order to the U.S. Court of Appeals for the Third Circuit. However, the Third Circuit granted employer's Motion to Dismiss on the grounds that Claimant's appeal was premature and the Third Circuit,

therefore, lacked jurisdiction. The case file was forwarded to the Third Circuit to the Board, who, in turn, sent it to the Office of Administrative law Judges under a cover memorandum dated January 16, 2003. The case file was actually received by the Office of Administrative Law Judges on or about February 4, 2003.

On February 18, 2003, I issued an Order Establishing Briefing Schedule whereby I authorized the parties to submit briefs on remand on or before May 5, 2003. Pursuant to that Order, briefs were submitted on behalf of Claimant and Employer, respectively.

Mandate on Remand

In its Decision and Order, dated January 29, 2001, the Benefits Review Board noted that it had previously affirmed my finding that Claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3) as unchallenged, but vacated my findings of pneumoconiosis and death due to pneumoconiosis under §718.202(a)(4) and §718.205(c), respectively. (BRB Decision and Order, note 2).

> In its second consideration of this case, the Board stated, in pertinent part:
>
> Initially, the third Circuit has held that "all types of relevant evidence must be weighed together" in determining whether claimant has met her burden of establishing the existence of pneumoconiosis pursuant to Section 718.202, *see Penn Allegheny coal Co. v. Williams*, 114 F3d 33, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997). The administrative law judge considered all of the relevant evidence of record pursuant to Section 718.202(a) and found that while the medical opinion evidence submitted with the miner's claim and the x-ray and CT scan evidence did not establish "clinical"

pneumoconiosis or coal workers' pneumoconiosis, it did establish chronic obstructive pulmonary disease (COPD) and emphysema, Decision and order on Remand at 2-4. The administrative law judge also considered the medical opinion evidence submitted with the survivor's claim, which included the medical opinion of Dr. Wald. Dr. Wald, who is board-certified in internal medicine, reviewed the evidence of record and concluded that, while the evidence did not reveal clinical pneumoconiosis and indicated that smoking was a major cause of the miner's COPD, coal mine dust exposure was also a "substantial contributing factor" in the progression of the miner's COPD and emphysema, which shortened his life and caused his death, Claimant's Exhibits 1, 2. On the other hand, Dr. Sinnenberg, board-certified in anatomical and clinical pathology, reviewed the evidence and found that the miner probably had mild coal workers' pneumoconiosis, but that the miner's COPD and emphysema were due to smoking which caused the miner's death, Employer's Exhibits 3-4, 7. Finally, a CT scan was reviewed by Dr. Sagel, a board-certified radiologist, who found no evidence of pneumoconiosis or coal workers' pneumoconiosis, but emphysema undoubtedly related to smoking, Director's Exhibit 19.

The administrative law judge found the evidence established that the miner's COPD was caused in part by his coal dust exposure, *i.e.*, the definition of pneumoconiosis as more broadly defined by the Act and the regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201. the administrative law judge found Dr. Wald's opinion convincing and corroborated by the x-ray evidence, to the extent that it also confirmed the diagnosis of COPD and/or emphysema. The administrative law judge also noted that the CT scan also confirmed the diagnosis of emphysema, while further noting that it had been related to smoking. The

administrative law judge stated that he was not persuaded that the negative x-ray evidence precluded finding coal workers' pneumoconiosis established because Dr. Wald stated, without contradiction in the record, that emphysema may mask finding coal workers' pneumoconiosis on x-ray. In addition, the administrative law judge noted that claimant's treating physician, Dr. Patel, Director's Exhibit 14, as well as Dr. Rao, Director's Exhibit 15, had diagnosed "cor pulmonale," which the administrative law judge stated has been held to be an indicator of coal workers' pneumoconiosis. The administrative law judge found that Dr. Sinnenberg's opinion that the miner's COPD was due to smoking is not disputed. Nevertheless, the administrative law judge noted that Dr. Sinnenberg also conceded that the miner probably had mild coal workers' pneumoconiosis, which the Administrative law judge found was supported by the opinions from the miner's claim from Dr. Eligator and Connelly, Director's Exhibit 38, who both diagnosed coal workers' pneumoconiosis and emphysema and/or obstruction due to the miner's coal dust exposure. Thus, the administrative law judge ultimately credited Dr. Wald's opinion that coal mine dust exposure was also "a substantially contributing factor" in the miner's COPD.

...[I]n accordance with the Board's previous remand instructions, the administrative law judge held that in light of Dr. Wald's uncontradicted statement [that emphysema may mask findings of coal workers' pneumoconiosis on x-ray], he was unpersuaded by the majority of negative x-ray readings. This is a rational and proper weighing of the evidence consistent with the standard enunciated in *Williams*. Moreover, as opposed to being inconsistent with a finding that pneumoconiosis was not established by the x-ray or medical evidence, Dr. Wald's statement offers an

explanation for his conclusion taking into consideration the x-ray evidence which is overwhelmingly negative for pneumoconiosis.

Nevertheless, the Administrative law judge did not follow the Board's previous remand instructions and indicate how much weight he accorded the negative CT scan readings...Dr. Sagel found no evidence of coal workers' pneumoconiosis or clinical pneumoconiosis on the miner's CT scan, but emphysema undoubtedly related to smoking, Director's Exhibit 19. Such a discussion is critical in this case since a majority of the x-ray evidence, as well some of the medical reports, are also negative for the existence of pneumoconiosis...

(BRB Decision and Order, pp. 3-5).

In addition, the Board stated that I had erroneously relied on the Board's holding in *Christian v. Monsanto Corp.*, 12 BLR 1-56, 1-58 (1988), in finding that the diagnosis of "cor pulmonale" by Drs. Patel and Rao is an indicator of coal workers' pneumoconiosis. As noted by the Board, neither the regulations nor the relevant case law "support the proposition that cor pulmonale is an indicator of the existence of pneumoconiosis absent a finding that the cor pulmonale is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." (BRB Decision and order, note 5). Accordingly, the Board stated that, "in considering the diagnosis of 'cor pulmonale' by Drs. Patel and Rao on remand, the Administrative law judge should provide an evidentiary basis for a finding that cor pulmonale is an indicator of the presence of pneumoconiosis." (BRB Decision and Order, p. 6).

Furthermore, the Board stated, in pertinent part:

The administrative law judge also provides no basis or reason for crediting the opinions from the miner's claim of Drs. Eligator and Connelly as supporting Dr. Sinnenberg's opinion from the survivor's claim that the miner probably had mild "clinical" coal workers' pneumoconiosis. As employer contends, an explanation of the weight given to the opinions from the miner's claim of Drs. Eligator and Connelly is especially necessary in light of the Administrative law judge's inconsistent finding that the medical opinion evidence from the miner's claim was insufficient to demonstrate pneumoconiosis...

Finally, employer contends that the administrative law judge erred in relying on a medical treatise that was not a part of the record under Section 781.202 and in order to credit Dr. Wald's opinion in finding death due to pneumoconiosis established pursuant to 718.205(c) and thereby substituted his opinion over Dr. Sinnenberg's opinion. In weighing the medical opinion evidence under Section 718.202, the administrative law judge cited a treatise stating that the symptoms of industrial bronchitis are no different than those of chronic bronchitis due to smoking and that the effects of smoking obscure those of dust exposure. *See* 4A *Gordy, Gray, Attorney's Textbook of Medicine* (3d Ed., 1987) §205B.80; Decision and Order on Remand at 3 n. 3, n. 4. Moreover, the administrative law judge found Dr. Wald's opinion more credible than Dr. Sinnenberg's contrary opinion under Section 718.205(c), in part, because Dr. Wald's opinion was in accord with the medical treatise cited by the administrative law judge. Decision and Order On Remand at 5.

> An administrative law judge may take judicial notice of a fact if a substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary…thus, the administrative law judge did not take proper judicial notice of the treatise he relied on under Sections 718.202 and 718.205(c), inasmuch as the administrative law judge did not give employer adequate notice and/or an opportunity to respond…Moreover, as employer contends, the administrative law judge's according of great weight to Dr. Patel's opinion under Section 718.205(c) as the miner's treating physician is inconsistent with the administrative law judge's original Decision and order in which he gave lesser weight to Dr. Patel's opinion as his qualification were unknown…
>
> Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a) and remand the case for reconsideration of all relevant evidence, *see Williams, supra.* Moreover, inasmuch as the administrative law judge erred in his weighing of the relevant medical opinion evidence under Section 718.205(c) and inasmuch as the administrative law judge's finding at Section 718.202(a) is determinative of his finding at Section 718.205 (c)…the administrative law judge's finding at Section 718.205(c) is also vacated. If the administrative law judge finds the existence of pneumoconiosis established pursuant to Section 718.202(a) on remand, he should then reconsider whether death due to pneumoconiosis is established pursuant to Section 718.205(c).

(BRB Decision and Order, pp. 6-9).

Findings of Fact and Conclusions of Law

Except as otherwise vacated by the Benefits Review Board, or superseded herein, all of the evidence which was previously discussed in my prior decisions, dated April 21, 1998 and August 31, 1999, respectively, of which the first decision was partially affirmed in the Board's initial Decision and Order, dated may 21, 1999, is incorporated herein by reference. This obviates the necessity for a complete repetition of all the evidence. Nevertheless, the points raised in the Benefits Review Board's Decision and Order, dated January 29, 2001, have been resolved, as set forth below, based upon my review and analysis of all the relevant evidence.

Pursuant to the Board's instructions, I must initially reconsider all the relevant evidence to determine whether the weight of such evidence establishes the presence of pneumoconiosis under §718.202(a). *See, Williams, supra.*

As set forth in the initial Decision and order Awarding Benefits, the overwhelming preponderance of the x-ray evidence was negative for pneumoconiosis under the classification requirements set forth in §718.102(b). Thus, pneumoconiosis was not established under §718.202(a)(1). (ALJ Decision and Order, dated 4/21/98, pp. 4-5,14-15). Furthermore, in the absence of biopsy or autopsy evidence, pneumoconiosis was also not established under §718.202(a)(2). In addition, none of the presumptions contained in §718.202(a)(3) are applicable. Thus, pneumoconiosis could not be established under that subsection. (ALJ Decision and Order, dated 4/21/98, p. 14). Moreover, my finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3) was expressly affirmed by the Board as unchallenged on appeal. (BRB Decision and Order,

dated 5/21/99, note 1; *See also* BRB Decision and order, dated 1/20/01, note 2).

Accordingly, the only possible basis upon which the Claimant may establish the presence of pneumoconiosis is through the medical opinion evidence under §718.202(a)(4). The crux of this case rests on whether Claimant has met his burden of establishing the presence of "legal pneumoconiosis," notwithstanding the absence of "clinical pneumoconiosis." *See* 20 C.F.R. §718.201. Underlying this issue

is whether the miner's severe chronic obstructive lung disease, which caused significant impairment and led to his death is attributable to his smoking, or the combined effects of smoking and coal mine dust exposure. In view of the foregoing, I have carefully reviewed the case file to clarify Mr. Ray's actual cigarette smoking and coal mine employment histories.

As previously noted, and set forth in Judge Colligan's Decision and Order-Denying Benefits, dated June 2, 1989, the miner testified that he only smoked on pack of cigarettes per day for 10-12 years ending in 1978 or 1980 (DX 38). In contrast, the Claimant, Judy Richard, testified that the miner smoked "approximately two packs a day until about two years before he passed away." (TR 19). Subsequently, she responded affirmatively to a slight mischaracterization of her earlier testimony, which suggested that the miner had smoked two packs of cigarettes per day up until about four years before he died (TR 32). The medical evidence, in particular the hospital records and notes of Dr. Patel, the miner's treating physician, are much more consistent with claimant's testimony than that of the miner.

Although some hospital records indicate a cigarette smoking history of "about one pack per day for about 30 years." (*See* DX 15, Hospital and Physical Examination, dated 3/1/96). The History and Physical Examination, dated September 18, 1995, states that Mr. Ray "used to be a very heavy smoker. Was a coal miner." (DX 15). Moreover, other hospital records set forth an even greater cigarette smoking history. For example, the miner reportedly "was a heavy smoker, one to two packs per day." (*See* DX 15, Hospital and Physical Examination, dated 2/23/95); and, another hospital record listed his smoking history as "about two packs per day for about 30 years." (*See* DX15, Hospital and Physical Examination, dated 6/5/96). In addition, Dr. Patel's medical notes clearly establish that the miner continued smoking long after 1978 or 1980. For example, a June 24, 1992 note states, in pertinent part: "PL: To quit smoking. He was given the full literature on the Habitrol patch" (DX 15). Similarly, on October 28, 1992, the following notation is made: "PL: to quit smoking. He continues to smoke. I advised him to try to quit. Return in 1 month." (DX 15).[2]

Based upon the foregoing, I find that Mr. Ray was a heavy cigarette smoker, who smoked between 1 and 2 packs of cigarettes per day for approximately 30 years ending in 1993 or 1994. On the other hand, Mr. Ray engaged in coal mine employment for approximately 13 or 14 years ending in February 1987 (DX 5-7). Accordingly, Mr. Ray's cigarette smoking history was more than twice the length of his coal mine employment history. Furthermore, Mr. Ray continued to be exposed to cigarette smoke for several years after his coal mine dust exposure had ended.

In accordance with the Board's instructions, I must reconsider all of the relevant medical opinion evidence, which include, in pertinent part, the opinions of Drs.

Eligator, Cander, Connelly, Bajwa, Scott, Tuteur, and Bush from the miner's claim; the CT scan interpretation by Dr. Sagel; the findings of cor pulmonale as diagnosed by Drs. Patel and Rao; the treatment notes and hospital records prior to the

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[2] Since Mr. Ray was seeking treatment for his medical problems, when his extensive cigarette smoking history was reported, I find the cigarette smoking histories as reported in the hospital records and treatment notes are more credible than those reported in pursuit of his black lung claim. As discussed above, the miner tended to understate his smoking history when he was seeking black lung benefits.

miner's death; the miner's death certificate; and, the medical opinions of Drs. Wald, Sinnenberg, and Scott, which relate directly to the survivor's claim.

Dr. Julian Eligator examined the miner on or about June 17, 1987 (DX 38). He diagnosed soft coal worker's pneumoconiosis with obstruction and marked the "Yes" box of the form report, which indicated that the diagnosed condition was related to dust exposure in the patient's coal mine employment. When asked to provide the medical rationale for this conclusion, Dr. Eligator simply noted: "history of exposure" and "chest x-ray." I note, however, that Dr. Eligator did not specify that length of Mr. Hall's coal mine employment history. More importantly, he apparently relied upon a positive chest x-ray reading which was inconsistent with the overwhelming preponderance of the x-ray evidence. Furthermore, Dr. Eligator was wholly unaware of the miner's extensive cigarette smoking history. He reported a wholly inaccurate cigarette

smoking history of only "4 cigs. weekly" for 10 years. Finally, I note that Dr. Eligator's credentials are not in evidence. In view of the foregoing, I accord little weight to Dr. Eligator's opinion.

Dr. Leon Cander, who is Board-certified in Internal Medicine and served as a government consultant on coal worker's pneumoconiosis, issued a letter, dated September 4, 1987 (DX 38). Dr. Cander reviewed the available record, which he summarized as follows: a documented history of 13 years of coal mine employment; no other occupational exposure capable of causing pneumoconiosis; a negative B-reading of a chest x-ray, dated June 2, 1987; and valid arterial blood gas and pulmonary function studies indicating the presence of disabling, chronic obstructive lung disease. Based upon the foregoing, Dr. Cander concluded:

1. The presence of disabling, chronic obstructive lung disease has been demonstrated.
2. The presence of a negative chest x-ray does not, of itself, exclude the presence of pneumoconiosis.
3. the inhalation of coal mine dust during the years of coal mine employment could only have contributed casually to the chronic obstructive lung disease.
4. The presence of disabling pneumoconiosis, as defined by the Act, has been demonstrated.

(DX 38).

Dr. Cander's analysis is cursory and neither well-reasoned not well-documented regarding the pneumoconiosis issue and/or the causal relationship between coal mine dust exposure and the miner's disabling, chronic obstructive lung disease. Although Dr. Cander correctly states that a negative chest x-ray

does not, of itself, exclude the presence of pneumoconiosis, the mere fact that the miner was exposed to coal mine dust for a period of approximately 13 years does not, in and of itself, establish that such exposure contributed causally to the miner's chronic obstructive lung disease. In the present case, Dr. Cander failed to even consider the miner's extensive cigarette smoking history as the etiology of the miner's chronic obstructive lung disease. Moreover, Dr. Cander did not explain why the disabling impairment demonstrated on pulmonary function study and arterial blood gas testing was more consistent with coal mine dust exposure than other possible etiologies. Therefore, I accord little weight to Dr. Cander's opinion.

Dr. T. P. Connelly examined the miner on February 6, 1989. In his written report on that date (DX 38), Dr. Connelly set forth the miner's subjective complaints; a slightly inflated coal mine employment history of 17 years in underground mining; abnormal physical findings on examination of the chest; a grossly understated cigarette smoking history of only one pack per day for ten years ending "sometime ago;" qualifying pulmonary function results; and, a positive chest x-ray reading of pneumoconiosis. Based upon the foregoing, Dr. Connelly opined that the miner has emphysema and coal worker's pneumoconiosis, and that his "industrially induced pulmonary disease has rendered this patient totally and permanently disabled." Although Dr. Connelly's finding of a total and permanent disability is consistent with the miner's subjective complaints and the abnormal pulmonary function studies, his finding of coal worker's pneumoconiosis and the relationship of the total disability to an industrial exposure is not as well-reasoned. In making this determination, I note that Dr. Connelly relied, at least in part, upon a very understated cigarette smoking history, and a highly questionable

positive x-ray finding of pneumoconiosis. In addition, I noted that Dr. Connelly's professional qualifications are not in evidence. In view of the foregoing, I accord little weight to Dr. Connelly's opinion regarding the pneumoconiosis and causation issues.

Dr. Surinder Bajwa examined the miner on April 24, 1987 (DX 38). Dr. Bajwa reported the miner's subjective complaints, histories of work in a glass factory and in the coal mines; and, a cigarette smoking history of "one pack of cigarettes a day for many years but claims that he stopped about two years ago." Physical findings on chest examination were abnormal. Furthermore, pulmonary function studies, which were conducted by Dr. Schiff on April 29, 1987, were clearly qualifying. Based upon the foregoing, Dr. Bajwa diagnosed severe chronic obstructive lung disease and hypertension. However, Dr. Bajwa did not specify the etiology of the miner's severe lung disease. Furthermore, his credentials are not in the record. Accordingly, Dr. Bajwa's opinion is given little weight regarding the pneumoconiosis and causation issues.

Dr. John H. Scott, a B-reader who is Board-certified in Internal Medicine and Pulmonary Disease, examined Mr. Ray on March 4, 1988. In his report, dated April 11, 1988 (DX 38), Dr. Scott set forth the miner's employment history; subjective complaints of dyspnea and chronic cough; a grossly understated smoking history or one pack per day for 8 or 9 years ending three years ago; physical findings on examination; a chest x-ray which was negative for pneumoconiosis; pulmonary function results which showed marked obstructive ventilatory defect without significant change after bronchodilator; arterial blood gases which showed mild hypoxemia; and, an abnormal resting electrocardiogram. In addition, Dr. Scott reviewed

additional medical data and cited medical literature. Based upon the foregoing, Dr. Scott concluded:

> In summary, based on the results of my examination and the review of the literature noted above, I believe that Mr. Ray has Obstructive Pulmonary Emphysema which has not occurred as a result of his exposure to coal dust. There is no objective evidence of pneumoconiosis. Using criteria outlined in the AMA Guides to the Evaluation of Permanent Impairment (2nd edition), there is marked impairment of the respiratory system. I do not believe that he would be capable of performing the duties of his last job as a miner or work requiring similar effort. In addition to the Emphysema, Mr. Ray has Hypertension which is poorly controlled with his current medication program.

(DX 38, Scott report, dated 4/11/88).

Dr. Scott reiterated the foregoing opinion in a supplemental report, dated February 13, 1989 (DX 38). Dr. Scott his own report, dated April 11, 1988, as well as additional medical evidence. Within such additional medical data was evidence that the miner had a more extensive cigarette smoking history than Dr. Scott had initially reported. Based upon his analysis of the medical evidence, as well as his discussion of epidemiologic studies using flow-volume measurements, Dr. Scott concluded:

> The findings in Mr. Ray are consistent with smoking as the etiologic factor for the changes. It is also known that cigarette smokers have an increased residual volume, but in addition heir total lung volume is likewise increased. Individuals with industrial bronchitis, on the other hand, may have a

> reduction in ventilatory capacity with hyperinflation and increase volume, but it is not associated with an increase in the total lung capacity; and, according to Morgan, it is not associated with the development of emphysema.

(DX 38, Scott report, dated 2/13/89).

Dr. Peter G. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Medicine, issued a report, dated December 29, 1988, in which he reviewed the available medical evidence, including several medical opinions, portions of hospital records, various clinical tests results, including chest x-rays, pulmonary function studies, and arterial blood gases. Furthermore, Dr. Tuteur reported a 16-year underground coal mine employment history ending in 1987 and the variable cigarette smoking histories. In summary, Dr. Tuteur acknowledged that the miner had sufficient coal mine dust exposure to produce pneumoconiosis in a susceptible host; and, sufficient cigarette smoking to be at increased risk for various medical problems. Following a thorough discussion of the available evidence, however, Dr. Tuteur concluded that the mine "does not have clinically significant, physiologically significant, or radiographically significant coal workers' pneumoconiosis." Moreover, Dr. Tuteur added that "Mr. Ray does not have any disease process arising out of coal mine dust exposure." Furthermore, Dr. Tuteur criticized Dr. Cander's statement that "the inhalation of coal mine dust during the years of coal mine employment could only have contributed casually to the chronic obstructive lung disease," stating that such a contribution, while possible in some cases, would be unusual (DX 38).

Dr. Bruce A. Bush, who is Board-certified in Internal Medicine, Pulmonary Diseases, and Critical

Care Medicine, examined the miner on February 15, 1989. In his report, dated February 24, 1989 (DX 38), Dr. Bush set forth a 17-year underground coal mining employment ending inn January 1988, while noting that during the period from February 1987 until h is retirement in January 1988, the miner was home on disability and he did not actually work. Dr. Bush also stated that "Mr. Ray claims to have quit smoking in 1967 or 1968 after having smoked approximately 1 pack per day for 10 years. His son who lives in the same house, smokes heavily." However, Dr. Bush apparently questioned the accuracy of the miner's smoking history. He noted that Mr. Ray had a "dusky appearance," a "fairly strong odor of cigarette smoke," and "an abnormal elevation of carboxyhemaglobin which is consistent with recent moderate cigarette smoking." Moreover, in the "Discussion" portion of his report, Dr. Bush noted that there is "laboratory evidence strongly suggesting that he continues to smoke cigarettes."[3] In addition to his discussion of Mr. Ray's coal mine employment and cigarette smoking, Dr. Bush outlined the miner's symptoms, past medical history, family history, review of systems, findings on physical examination, and the results of various clinical tests, as follows: a chest x-ray reading which revealed some abnormalities, but was negative for pneumoconiosis; an electrocardiogram within normal limits; pulmonary function results which were interpreted as revealing "a very severe obstructive ventilatory defect which is not improved on acute post-dilator study;" and arterial blood gases "consistent with mild arterial hypoxemia." Based upon the foregoing, Dr. Bush set forth the following diagnoses:

1. Very severe chronic obstructive pulmonary disease, primarily of the emphysematous type, but with historical elements suggesting a contribution of chronic bronchitis.

2.Uncontrolled mild hypertension.
3.Solitary pulmonary nodule of the left lung, rule out carcinoma.
4.No radiographic evidence sufficient to justify diagnosis of pneumoconiosis.

In the "Discussion" section of his report, Dr. Bush opined that the miner was sufficiently impaired by his COPD that he could not return to his last coal mine job or similar work. However, Dr. Bush reiterated that, in his opinion, "this condition is due to cigarette abuse, and that Mr. Ray does not have coal workers' pneumoconiosis." Finally, Dr. Bush reviewed other available medical data; questioned the smoking history reported by Dr. Eligator and the opinion of Dr. Cander; and, agreed with the opinions of Drs. Scott and Tuteur. (DX 38).

As instructed by the Board, I have also reconsidered Dr. Sagel's CT scan interpretation. Dr. Stuart S. Sagel, a Board-certified radiologist, interpreted a CT scan, dated January 13, 1993 (DX 19). In pertinent part, Dr. Sagel reported the following findings:

> Changes of moderately advanced pulmonary emphysema are present. The abnormalities dominate in the upper lobes, characteristic of the centrilobular form of this disease, usually related to cigarette smoking.
>
> Some infiltrate is present in the anterior segment of the right upper lobe, probably secondary to a prior inflammatory process such as pneumonia....
>
> No interstitial infiltrate is present. No findings compatible with pneumoconiosis are identified.

(DX 19). Furthermore, in a cover letter, dated September 13, 1996, Dr. Sagel stated, in pertinent part: "I find no definitive evidence of coalworkers' pneumoconiosis or silicosis; the dominant pulmonary pathology is emphysema (undoubtedly related to cigarette smoking)." (DX 19).

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[3] In view of subsequent credible evidence that the miner smoked 1 to 2 packs for 30 years ending in the early 1990's, Dr. Bush's suspicions regarding the accuracy of the miner's claimed smoking history proved to be correct.

Although Dr. Sagel's CT scan interpretation does not preclude the possibility of "legal pneumoconiosis," it is more consistent with those physicians' opinions who opined that the miner's disabling impairment is related to cigarette smoking rather than pneumoconiosis.

Similarly, I have reevaluated the findings of cor pulmonale as diagnosed by Drs. Patel and Rao, in light of the Board's Decision and Order in this matter. In the absence of credible, reasoned opinions by Drs. Patel and Rao which relate cor pulmonale to Mr. Ray's coal mine employment, I no longer find that their diagnosis of cor pulmonale is an indicator of pneumoconiosis.

In addition, I have reviewed the treatment notes and hospital records, particularly in the period shortly before the miner's death. Such records reveal that the miner suffered from numerous medical problems, including: acute and chronic respiratory failure, bilateral infiltrates, end-stage COPD, hypertension, coronary artery disease, ASHD with old myocardial

infarction, SIADH, and discogenic disease (DX 13,14,15). However, in the absence of credible, reasoned medical opinions that any of the foregoing conditions were coal mine-related, the notes and hospital records do not establish the presence of "legal pneumoconiosis."

The death certificate, signed by Dr. Mohan M. Patel, the miner's treating physician, states that the miner died, on April 18, 1996, of end stage chronic obstructive lung disease, which began "years" before his death. In addition, Dr. Patel listed "CAD" (*i.e.*, hypertension) as other significant conditions contributing to death, but not to resulting in the underlying cause. No autopsy was performed (DX 12). The death certificate begs the question as to whether the miner's end stage COPD and/or other conditions listed as contributing to death were related to the miner's coal mine employment history. Thus, it is also insufficient to establish the presence of pneumoconiosis.

Finally, I have also reconsidered the opinions of Drs. Wald, Sinnenberg, and Scott, which were filed in conjunction with the survivor's claim, in accordance with the Board's instructions to weigh all the relevant medical opinion evidence.

Dr. Michael E. Wald is an A-reader who is Board-certified in Internal Medicine. His "practice is limited to the field of internal medicine, which is the diagnosis and treatment of adult diseases. Dr. Wald estimated "that about 50 percent of that practice is limited to the subspecialty area of respiratory or pulmonary disease. Furthermore, Dr. Wald stated that he has treated people with coal worker's pneumoconiosis, and, approximately 20 or 25 current patients have that condition (CX 6, Wald Deposition, pp. 9-10,29). However, Dr. Wald acknowledged he is not a Board-certified

pulmonologist; that there is not treatment for coal worker's pneumoconiosis; and, to his knowledge, he never personally saw Mr. Ray during his lifetime (CX 6,Wald Deposition, pp. 26,29).

In his report, dated September 21, 1997 (CX 1), Dr. Wald referred to various documents and medical records, including two chest x-rays, a CT scan, the miner's death certificate, and hospital records, which included a number of ventilatory studies. In addition, Dr. Wald reported a slightly inflated coal mine employment history of "approximately seventeen years;" and, an understated cigarette smoking history of "one pack a day for approximately twenty years." While noting there were inconsistencies in the records regarding when the miner quit smoking, Dr. Wald concluded that "Mr. Indicated that he last smoked either in the late 1970's or 1980. This was sixteen years before his death." For the reasons outlined above, I find that this smoking history is clearly erroneous and that the miner continued smoking until the end of 1992 or later.

In summary, Dr. Wald noted that the x-ray reports indicated that the lungs appear emphysematous with hyperinflation and some interstitial markings; however, Dr. Wald did "not see nodular densities in the upper lobes which would be the hallmark of coal workers pneumoconiosis. However, Dr. Wald suggested that "such findings may be masked by the emphysematous changes in the lung." Dr. Wald also stated that the CT scan confirm what has been reported by others in their radiographic reports. Furthermore, Dr. Wald stated that the ventilatory studies show "a severe degree of airways obstruction." He also noted evidence of cor pulmonale on electrocardiogram. In addition, Dr. Wald reported that the miner's progressive deterioration resulted in

death as a result of respiratory failure. Based upon the foregoing, Dr. Wald concluded:

> It is generally agreed that Mr. Ray did die as a result of his respiratory problems which resulted in respiratory failure. The question still centers around the etiology of his respiratory disease. He had evidence of chronic bronchitis and pulmonary emphysema, together being referred to as chronic obstructive pulmonary disease. I would agree that previous smoking played a contributing role in the development and progression of this problem. However, he also worked in an environment that exposed him to continued inhalation of irritating dusts. This work environment was also a substantial contributing factor to the progression of his obstructive airways disease to the point of his death. I cannot argue with any qualified individuals who have stated that there is no absolutely definitive indication of coal workers pneumoconiosis seen on chest x-rays. However, I would take serious objection that his work environment was not a factor in his problem. I believe that it was a substantial factor in the progression of his disease state to the point of ultimate demise.

(CX 1).

In his deposition testimony on January 27, 1998, Dr. Wald reiterated his conclusion that the miner suffered from legal pneumoconiosis; that his work environment was a substantial aggravating factor which caused the progression of his chronic obstructive; and, in turn, shortened the miner's life (CX 6, pp. 56-57).

Upon further review of Dr. Wald's opinion is contrary to the preponderance of the more credible

medical evidence, and that it is also somewhat ambiguous and conflicting. For example, Dr. Wald acknowledged that he did not see radiographic manifestations of pneumoconiosis by x-ray or CT scan. While he again noted that these abnormalities may be present, but masked by the overdistended emphysematous lung, Dr. Wald also acknowledged: "That's just conjecture on my part. I don't know that that's true, but it is a possibility." (DX 6, pp. 44-45). Accordingly, even Dr. Wald did not find clinical pneumoconiosis. Furthermore, Dr. Wald stated that simple coal worker's pneumoconiosis, if it progresses to the point of causing ventilatory impairment, will predominantly be restrictive; but that in the complicated forms of pneumoconiosis one sees obstructive disease as well (CX 6, pp. 36-37). Notwithstanding the absence of clinical pneumoconiosis, and absolutely no evidence of complicated pneumoconiosis, Dr. Wald attributed the miner's chronic obstructive pulmonary disease, which encompasses the miner's emphysema and bronchitis, at least in substantial part to his coal mine employment. Moreover, Dr. Wald opined that the chronic lung disease resulted in a progressive impairment, which ultimately caused the miner's death (CX 6, pp. 22,38,56). However, Dr. Wald's opinion presupposes the fact that the miner's disabling impairment prior to death was due to, at least in significant part, to his occupational exposure. While stating that the latency period for coal dust=related pneumoconiosis is only a "short number of years," Dr. Wald acknowledged that if Judge Collins' 1989 decision were accurate (*i.e.*, Mr. Ray had not developed legal pneumoconiosis), "the probability of him [the miner] developing legal pneumoconiosis subsequently would be very small." (CX 6, pp. 34-35). However, Dr. Wald explicitly stated that he disagreed with the 1989 decision (CX 6, pp. 51-52). In rejecting the 1989 decision, Dr. Wald did not simply disagree with Judge Colligan's finding of no

legal pneumoconiosis, but also the well-reasoned and documented medical opinions of three Board-certified pulmonary specialists (*i.e.*, Drs. Scott, Tuteur, and Bush) which underlie it. In view of the foregoing, I no longer find Dr. Wald's opinion to be persuasive regarding the "pneumoconiosis" and "causation" issues.

Dr. Robert Sinnenberg, who is Board-certified in Anatomic and Clinical Pathology (EX 4), issued a report, dated September 19, 1997 (EX 3), in which he reviewed various medical records. In addition, Dr. Sinnenberg reported an underground coal mining history from 1971 until 1987; and, a smoking history of "about one pack per day for 30 years." Following his discussion of the available medical data, the miner's history, and citing medical literature, Dr. Sinnenberg stated:

> In summary, I conclude with reasonable medical certainty that the cause of Mr. Ray's death was respiratory failure due to chronic obstructive pulmonary disease, and specifically pulmonary emphysema. The etiology of his fatal pulmonary emphysema was cigarette smoking. Objective medical evidence of coal workers' pneumoconiosis is not consistently documented in the medical records, and in fact the preponderance of opinion appears to indicate that coal workers' pneumoconiosis did not exist.
>
> I believe that given the occupational exposure, coal workers' pneumoconiosis may have existed to some mild extent, but was not clinically significant and did not contribute to his death.

(EX 4).

In his deposition testimony on November 25, 1997 (EX 7), Dr. Sinnenberg, again, provided an equivocal finding of pneumoconiosis. In pertinent part, Dr. Sinnenberg stated:

> I believe that Mr. Ray *probably* had a mild form of coal workers' pneumoconiosis. His chest x-rays were equivocal, but I believe with the history of exposure of 16 years in underground mines, he was certainly at risk for that. Given the clinical nature of the chest x-rays, I feel that he *probably* had a very mild form.

(EX 7, p. 13). (emphasis added).

Furthermore, when asked whether he believed that "coal workers' pneumoconiosis or any other condition related to occupational dust exposure hastened Mr. Ray's death," Dr. Sinnenberg answered "No, I don't." Moreover, he explained the basis of his opinion, as follows:

> I feel that if the coal workers' pneumoconiosis was present at all, it was very mild, and in the form that would not show up consistently on a chest x-ray, and in my experience and in the literature, cases that are this mild do not cause any physiologic impairment of the lungs.

(EX 7, p. 14). (Emphasis added).

Based upon my reevaluation of Dr. Sinnenberg's opinion, I find it to be equivocal regarding the "pneumoconiosis." Furthermore, the portion of Dr. Sinnenberg's opinion in which he stated that pneumoconiosis, if found, did not cause any physiologic impairment nor hasten the miner's death is

more consistent with the opinions of Drs. Scott, Tuteur, and Bush than those of Drs. Wald, Eligator, and Cander. However, I note that Dr. Sinnenberg's area of expertise is pathology, pulmonary medicine; and, in the present case, he did not analyze biopsy or autopsy evidence. In view of the foregoing, I accord Dr. Sinnenberg's opinion little weight.

Dr. John H. Scott, the B-reader and Board-certified pulmonary specialist who previously examined the miner on March 4, 1988 and provided a well-reasoned and documented medical opinion that the miner's totally disabling impairment was due to cigarette-induced obstructive pulmonary emphysema, *not* pneumoconiosis or industrial bronchitis (DX 38), also addressed "pneumoconiosis" and "causation" issues in the survivor's claim.

In a report, dated December 31, 1996, Dr. Scott reviewed his prior report, as well as additional medical data, including the miner's death certificate, numerous hospital records, pulmonary function results, arterial blood gases, chest x-ray readings, CT scan evidence, the medical records of Dr. Patel, and the medical opinions of Drs. Cander, Bajwa, Connelly, Tuteur, and Bush. Furthermore, Dr. Scott noted the conflicting smoking histories and reported a 16 or 17 year mine employment history. In summary, Dr. Scott stated:

> Based on my review of the various records, including those of my previous examination of Mr. Ray in 1988, it is my opinion with a reasonable degree of medical certainty that Mr. Ray had severe chronic obstructive pulmonary disease with evidence of pulmonary emphysema. I do not believe that Mr. Had coal workers' pneumoconiosis or occupational lung disease. Mr. Ray also had hypertension and coronary artery disease with at

> least one previous myocardial infarction. Mr. Ray had a history of recurrent respiratory infections with exacerbation of his chronic obstructive pulmonary disease that was a heavy cigarette smoker. I believe he died as a result of chronic obstructive pulmonary disease and emphysema with superimposed respiratory infection and pneumonia. Hypertension and coronary artery disease were other factors involved in his demise. It is my opinion that Mr. Ray died when he did as a result of severe chronic obstructive pulmonary disease and pulmonary emphysema, which was caused by his long history of cigarette smoking. I do not believe that he had coal workers' pneumoconiosis or occupational lung disease as previously stated and do not believe that coal dust exposure or occupational exposure contributed to his death.

(DX 34).

Having carefully reconsidered the relevant evidence, in accordance with the Board's instructions, I no longer find that Claimant has met her burden of establishing pneumoconiosis under §718.202(a)(4), or by any other means. Upon reconsideration, I independently have reached the same conclusion as Judge Colligan did in his Decision and Order – Denying Benefits, dated June 2, 1989; namely, that neither clinical nor legal pneumoconiosis has been established.

As stated above, Dr. Eligator's credentials are not in evidence, and he relied upon a questionable chest x-ray interpretation and a grossly understated cigarette smoking history. Dr. Cander is a well – credential Board-certified Internist, but he is not Board-certified in pulmonary diseases. More importantly, I find his analysis is cursory and neither well-reasoned nor well-

documented. Dr. Connelly's professional qualifications are not in evidence. Furthermore, he relied at least in part, upon a very understated cigarette smoking history, and a highly questionable positive x-ray finding of pneumoconiosis. In addition, Dr. Sinnenberg's opinion regarding the pneumoconiosis issue is equivocal, and, his expertise is a pathologist, not as a pulomologist. In view of the foregoing, I accord little weight to the opinions of Drs. Eligator, Cander, Connelly, and Sinnenberg. Moreover, I no longer find the diagnosis of "cor pulmonale" by Drs. Patel and Rao as an indicator of coal worker's pneumoconiosis, since the evidence does not establish that the disease arose from coal mine employment. Similarly, the findings of a disabling respiratory and pulmonary impairment prior to death and end-stage COPD resulting in death are insufficient to establish "legal pneumoconiosis," absent credible evidence that these conditions were coal mine related.

Accordingly, the crux of this case rests on whether to credit Dr. Wald's opinion that the miner's chronic obstructive pulmonary disease, which caused his disabling respiratory impairment and death, were attributable in substantial part to dust exposure in coal mine employment; or, whether to accord greater weight to the opinions of Drs. Scott, Tuteur, and Bush, who found that it was wholly due to cigarette smoking, and that it was not coal mine-related.

As previously stated, Dr. Wald is Board-certified in Internal Medicine and he testified that a significant part of his practice is devoted to pulmonary medicine, including some patients who have pneumoconiosis; however, he is not Board-certified pulmonologist. In contrast, Drs. Scott, Tuteur, and Bush are all well-credentialed, Board-certified pulmonary specialists. Furthermore, Dr. Wald is only an A-reader, while Dr.

Scott is a B-reader. Dr. Wald only reviewed the miner's records following Mr. Ray's death. On the other hand, Drs. Scott and Bush examined the miner during his lifetime. Moreover, Dr. Scott also reviewed the record after the miner's death. In addition, Dr. Wald conceded that his suggestion the radiographic evidence of pneumoconiosis might have been masked by other abnormalities, such as emphysema, was "just conjecture." Furthermore, even Dr. Wald acknowledged that he did not find clinical pneumoconiosis on x-ray and CT scan. Finally, Dr. Wald rejected Judge Colligan's 1989 determination that the miner did not have legal pneumoconiosis, but conceded that, assuming it was accurate, the likelihood the miner would have developed legal pneumoconiosis after 1989 would be very small.

In summary, I find that the x-ray evidence and CT scan is overwhelmingly negative for clinical pneumoconiosis. I also note that Dr. Sagel not only found no evidence of clinical pneumoconiosis on the CT scan, but that the emphysema shown thereon was due to smoking. Moreover, I find the *credible* medical and lay evidence establishes that the miner was a heavy cigarette smoker; and that he smoked between one and two packs per day for about 30 years ending in or about 1993. In contrast, the miner worked less than half that number of years in the coal mines, and his exposure to coal dust ended in February 1987 (*i.e.*, more than nine years before his death). The foregoing evidence is more supportive of the reasoned and documented opinions of Drs. Scott, Tuteur, and Bush and the contrary opinion of Dr. Wald. Therefore, I find the Claimant has failed to meet her burden of establishing the presence of (clinical or legal) pneumoconiosis under §718.202(a)(4), or by any other means.

Pursuant to the Board's instructions and the Third Circuit's holding in *Williams, supra,* I have also reweighed all the different types of relevant evidence together to determine whether pneumoconiosis has been established under §718.202(a). As set forth above, the x-ray evidence is overwhelmingly negative for pneumoconiosis under the classification requirement set forth in §718.202(a)(1); the pulmonary function studies and arterial blood gas tests indicate that the miner suffered from a totally disabling respiratory or pulmonary impairment prior to his death, but do not establish its etiology; and, the preponderance of the medical opinion evidence, including CT scan evidence and the reasoned medical opinions of several Board-certified pulmonary specialists, is negative for (clinical and legal) pneumoconiosis. Therefore, I find the claimant has failed to meet her burden of establishing pneumoconiosis under §718.202(a).

Conclusion

Although the evidence establishes that Mr. Ray worked in the coal mines for about 13 or 14 years, and that his disability and death were caused by his respiratory and pulmonary conditions, Claimant has failed to establish (clinical or legal) pneumoconiosis by a preponderance of the relevant evidence. Therefore, I find that Claimant is not entitled to benefits under the Act and applicable regulations.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in the cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for services rendered for her in pursuit of this claim.

Order

It is ordered that the claim of Judy M. Richard, on behalf of Barbara A. Ray, survivor of Ralph Edward Ray, for black lung benefits under the Act is hereby **DENIED.**

S
RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Order may appeal to the Benefits Review Board within 30 days from the date of this Decision and Order, by filing a notice of appeal with the ***Benefits Review Board at P. O. Box 37601, Washington, D.C. 20013-7601.*** A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

U.S. Department of Labor
Benefits Review Board
P. O. Box 37601
Washington, D.C. 20013-7601

BRB No. 03-0824 BLA

JUDY M. RICHARD
(on behalf of BARBARA A. RAY, Surviving Child of RALPH E. RAY)

Claimant-Petitioner

v.

KEYSTONE COAL MINING CORPORATION

Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED:
Sept 28, 2004

DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

David A. Colecchia (Law Care), Greensburg, Pennsylvania, for claimant.

Julie A. Roland (Thompson, Calkins & Sutter), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order On Second Remand – Denying Benefits (97-BLA-0952) of Administrative Law Judge Richard A. Morgan on a survivor's claim[1] filed

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[1]On May 17, 1996, claimant, Judy M. Richard, filed the current survivor's claim on behalf of her sister, Barbara A. Ray, who is the miner's dependent disabled child. Director's Exhibit 1. The miner, Ralph E. Ray, filed an application for benefits on April 1, 1987, which was finally denied in a Decision and Order issued by Administrative Law Judge Michael F. pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] This case is before the Board for the third time. The procedural history of this case is contained in the Board's most recent decision. *Richard v. Keystone Coal Mining Corp.*, BRB No. 00-0152 BLA (Jan. 29, 2001) (unpub.). In that decision, the Board held that the administrative law judge failed to follow its previous remand instructions to indicate how much weight, if any, he accorded the negative CT scan

readings. The Board held further that the administrative law judge erred in finding that the diagnosis of cor pulmonale rendered by Drs. Patel and Rao was an indicator of the existence of pneumoconiosis and erred in relying on a medical treatise that was not a part of the record in order to credit Dr. Wald's opinion under 20 C.F. R. §§718.202(a) and 718.205(c). The Board additionally held that the administrative law judge failed to provide a basis or reason for his crediting of the opinions of Drs. Eligator and Connelly. Consequently, the Board vacated the administrative law judge's findings pursuant to 20 C.F. R. §§718.202(a) and 718.205(c) and remanded the case.

On remand, the administrative law judge reevaluated all of the medical opinion evidence of record, including the CT scan evidence, in accordance with the Board's remand instructions and concluded that he could no longer find the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge found that the x-ray and CT scan evidence was overwhelmingly negative for the existence of pneumoconiosis and that the preponderance of the medical opinion evidence failed to establish the presence of pneumoconiosis under Section 718.202(a)(4). Therefore, the administrative law judge determined that a finding of entitlement was precluded because claimant failed to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in reversing his prior credibility determinations on remand in order to find that the opinions of Drs. Scott, Teteur, and Bush outweighed the opinion of Dr. Wald and erred in finding that Dr. Sinnenberg's opinion was equivocal. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

Colligan on June 2, 1989. Director's Exhibit 38. The miner died on April 18, 1996. Director's Exhibit 12.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge erred in reversing his prior credibility determinations under Section 718.202 (a)(4) because the Board affirmed these findings inn its previous decision, and consequently, these determinations became the law of the case and were binding on subsequent proceedings.[3] Claimant asserts, therefore, that the administrative law judge's crediting on remand of the opinions of Drs. Scott, Tuteur, and Bush, physicians who found that the miner did not have pneumoconiosis, contradicts the Board's affirmance of the administrative law judge's previous rejection of these physicians' opinions.

Contrary to claimant's assertion, the Board did not explicitly or implicitly affirm the administrative law

judge's previous relevant determinations. Rather, in reviewing the administrative law judge's determination as to whether the existence of pneumoconiosis was established, the Board vacated the administrative law judge's weighing of the medical opinion evidence and his attendant finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) in both the 1999 and 2001 decisions. *Richard*, BRB No. 00-0152 BLA, *slip op.* at 7; *Richard*, BRB No. 98-1146BLA, *slip op* 5. It is well established that when the Board vacates an administrative law judge's decision, be it an award or denial of benefits, it annuls or sets aside that decision rendering it of no force or effect. The effect of the Board's action is to return the parties to the *status quo ante* the administrative law judge's decision. *Dale v. Wilder coal Co.*, 8 BLR 1-119, 1-120 (1985). Consequently, the Board's 2001 decision to vacate the administrative law judge's finding at Section 718.202(a), in effect, annulled all of the administrative law judge's prior pertinent weighing of the evidence, factual findings, and conclusions of law. Thus, the administrative law judge was not bound by his prior credibility determinations when he reconsidered the medical evidence on remand. Because the administrative law judge discussed the CT scan

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[3]In support of her argument, claimant cites the Board's 1999 decision stating, "In crediting Dr. Wald's opinion, the administrative law judge permissibly criticized Dr. Scott for failing to account persuasively for the miner's exposure to coal dust." *Richard v. Keystone Coal Mining Corp.*, BRB No. 98-1146 BLA.), *slip op.* at 5 (May 21, 1999) (unpub. Similarly, claimant cites the Board's 2001 decision stating, "The administrative law judge again, as previously affirmed by the Board, discounted Dr. Scott's opinion, ... that claimant did not have coal workers' pneumoconiosis or occupational lung disease...," *Richard*

v. Keystone Coal Mining Corp., BRB No. 00-0152 BLA, *slip op.* at 4 n.4 (Jan. 29, 2001) (unpub.).

and medical opinion evidence on remand in accordance with the Board's instruction and sufficiently explained his weighing of the conflicting evidence of record, we reject claimant's argument that the administrative law judge erred in making credibility determinations *de novo*.

Claimant next contends that the administrative law judge erred in rejecting the opinion of Dr. Wald because, in his prior decisions, the administrative law judge credited Dr. Wald's opinion as he was the only physician who considered the impact of the miner's many years of coal mine employment, which caused the miner's chronic obstructive pulmonary disease. Acknowledging that the administrative law judge's discounting of Dr. Wald's opinion "appears to follow established principles for weighing evidence," claimant argues that, nevertheless, the administrative law judge erred in according less weight to Dr. Wald's opinion because he is only an A-reader and not a Board-certified pulmonologist, where Dr. Wald is Board-certified in internal medicine, a Fellow in the College of Chest Physicians, and an assistant professor or clinical medicine at the University of Pittsburgh. Further, claimant contends that the administrative law judge erred in criticizing Dr. Wald's admission during his deposition that part of his testimony was "conjecture" and "only a possibility." Brief of Claimant at 11.

Contrary to claimant's contention, the administrative law judge acknowledged Dr. Wald's medical expertise by noting that he is Board-certified in internal medicine, that a significant portion of his practice is devoted to pulmonary medical care, and that he is an A-reader. However, the administrative law judge found that the opinions of Drs. Scott, Tuteur, and Bush, physicians who opined that the miner did not suffer from coal

workers' pneumoconiosis, were more persuasive because these physicians "are well-credentialed, Board-certified pulmonary specialists." *See Balsavage v. Director, OWCP*, 295 F.3d 390, 397, 22 BLR 2-386, 2-396 (3d Cir. 2002) ("physicians' reasoning, consideration of records, and credentials are relevant to an ALJ's determination"); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1997); Decision and Order on Second Remand at 12, 16. The administrative law judge accorded less weight to Dr. Wald's opinion that, while the miner's chronic obstructive pulmonary disease initially resulted from his cigarette smoking history, this disease was aggravated and accelerated by coal dust exposure, because it was not only "somewhat ambiguous and conflicting" but also contrary to the preponderance of the more credible medical evidence. Decision and Order on Second Remand at 13-14. specifically, the administrative law judge noted that Dr. Wald characterized as "just conjecture" his own deposition testimony that, even though the miner's x-rays and CT scan did not demonstrate any radiographic manifestations of pneumoconiosis, abnormalities indicative of pneumoconiosis may have been masked by the changed due to the emphysema in the miner's lungs. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *cf. Balsavage*, 295 F.3d at 397, 22 BLR at 2-396 (finding error in administrative law judge's rejection of physician's opinion as "qualified" since entire opinion must be read in context); Claimant's Exhibit 5 at 45. The administrative law judge found that while Dr. Wald disagreed with the prior finding in the miner's claim in 1989, that the miner did not have pneumoconiosis, he admitted that the likelihood of the miner developing pneumoconiosis after 1989 would be very small. In addition, the administrative law judge noted that Dr. Wald's disagreement with the previous finding that the miner did not have pneumoconiosis was not only contrary to Judge Colligan's adjudication of the miner's claim, but

was also contrary to the well-reasoned and documented medical opinions of three Board-certified pulmonary specialists, namely Drs. Scott, Tuteur, and Bush. Decision and Order on Second Remand at 14. Consequently, the administrative law judge found that, in light of Dr. Wald's flawed opinion, he could no longer find that Dr. Wald's opinion was more persuasive than the opinions of Drs. Scott, Tuteur, and Bush regarding the existence of pneumoconiosis. Contrary to Claimant's contention that the administrative law judge improperly rejected Dr. Wald's opinion simply because Dr. Wald disagreed with the opinions of "other qualified physicians," the administrative law judge properly found that the opinions of the "other physicians" were better reasoned and rendered by physicians with greater pulmonary expertise. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc); King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Because the administrative law judge critically assessed the probative value of each medical opinion and, within a rational exercise of his discretion, discounted Dr. Wald's opinion because it contained flaws rendering it less probative, we reject claimant's argument that the administrative law judge improperly discounted Dr. Wald's opinion.

Contesting the administrative law judge's weighing of Dr. Sinnenberg's opinion was equivocal. Claimant avers that Dr. Sinnenberg's mere usage of the terms "probably" and "if" does not necessarily nullify his medical opinion that the miner suffered from coal workers' pneumoconiosis. A review of Dr. Sinnenberg's opinion reveals that the administrative law judge's determination was rational and supported by substantial evidence. The administrative law judge reevaluated Dr. Sinnenberg's September 19, 1997 opinion that objective medical evidence of coal workers' pneumoconiosis was not consistently documented in the

medical records. Specifically, Dr. Sinnenberg found that "the preponderance of opinion appears to indicate that coal workers' pneumoconiosis "may have existed to some mild extent." Employer's Exhibit 3. Similarly, the administrative law judge reconsidered Dr. Sinnenberg's November 25, 1997 deposition testimony that the miner "probably had a mild form of coal workers' pneumoconiosis" and "if the coal workers' pneumoconiosis was present at all, it was very mild, ... in the form that would not show up consistently on a chest x-ray." Employer's Exhibit 7 at 13, 14. The administrative law judge properly found that Dr. Sinnenberg, who is Board-certified in pathology, rendered an equivocal opinion regarding the existence of pneumoconiosis and therefore, found that this opinion was worthy of little weight. *See Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19; Decision and Order on Second Remand at 15. Further, the administrative law judge noted that Dr. Sinnenberg's opinion that pneumoconiosis, if found, did not cause any physiologic impairment or hasten the miner's death, was consistent with the opinions of Drs. Scott, Tuteur, and Bush, physicians who, as found by the administrative law judge, rendered more credible opinions. Accordingly, we reject claimant's argument challenging the administrative law judge's weighing of Dr. Sinnenberg's opinion.

Next, claimant asserts that the administrative law judge erred in crediting the opinions of Drs. Scott, Tuteur, and Bush because they failed to address the issue of whether the miner had legal or statutory pneumoconiosis and only addressed the issue of whether the miner had clinical pneumoconiosis. We disagree. In his reports dated April 11, 1988, February 1, 1989, and December 31, 1996, Dr. Scott opined that the miner suffered from marked impairment due to chronic obstructive pulmonary disease with emphysema caused cigarette smoking over a period of years. Director's Exhibits 34, 38. On December 29, 1988, Dr. Tuteur opined that the miner's severe chronic

obstructive pulmonary disease, manifested both by chronic bronchitis and emphysema, was not related to, aggravated by, or caused by the inhalation of coal mine dust and concluded that the miner had no disease process arising out of coal mine dust exposure. Director's Exhibit 38. Likewise, Dr. Bush diagnosed chronic obstructive pulmonary disease, primarily of the emphysematous type with an element of chronic bronchitis, due to cigarette abuse. Director's Exhibit 38.

The regulation set forth in 20 C.F.R. §718.201 provides, in pertinent part, "[f] or purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae...arising out of coal mine employment. ...For purposes of this section, a disease 'arising out of coal mine employment' includes any chronics pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a), (b). Chronic obstructive lung disease is encompassed within the definition of pneumoconiosis for purposes of entitlement to benefits provided that there is competent medical evidence that the miner's coat dust exposure contributed to this pulmonary condition. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000) (legal definition of pneumoconiosis requires evidence that coal dust exposure aggravated respiratory condition); *Handy v. director, OWCP*, 16 BLR 1-73m 1-76 (1990) (medical opinions insufficient to support finding of pneumoconiosis where physicians found respiratory condition unrelated to dust exposure in miner's coal mine employment); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990). Consequently, the opinions of Drs. Scott, Tuteur, and Bush addressed the issue of the presence, or rather absence in this case, of legal pneumoconiosis inasmuch as these physicians opined that the miner's chronic obstructive pulmonary disease was

related to the miner's cigarette smoking history and not to his dust exposure in his coal mine employment.

Hence, contrary to claimant's assertion, the opinions of Drs. Scott, Tuteur, and Bush addressed the issue of whether the miner suffered from pneumoconiosis as defined in the Act, and we hold that the administrative law judge reasonably found that these physicians' opinions were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* 30 U.S.C. §902(b); 20 C.F.R. §718.201.

Claimant also asserts that because Drs. Scott, Tuteur, and Bush opined that the miner's "long-term exposure to coal dust had no impact at all on his medical condition," the administrative law judge erred in according dispositive weight to these physicians' opinions because this conclusion is antithetical to the Act. Brief of Claimant at 14. Further, claimant argues that the opinions of Drs. Scott, Tuteur, and Bush are not persuasive evidence on the issue of whether the miner had pneumoconiosis because they were rendered in 1988 and 1989, which was seven or eight years before the miner died. Claimant asserts that these opinions are thus "too old and stale to constitute reliable evidence." Brief of Claimant at 15.

As an initial matter, claimant is correct that most of the circuit courts have held that an administrative law judge may discount a medical opinion predicated on a tenet that is inimical to the Act., *e.g.*, pneumoconiosis does not progress after cessation of a miner's coal mine employment, obstructive disorders cannot be caused by coal mine employment, etc., because such an opinion is hostile to the Act, and therefore, is not entitled to much, if any, weight. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d

Cir. 1995); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989). However, none of the challenged physicians herein assumed that coal mine employment can never cause chronic obstructive pulmonary disease; they merely opined that in this case, the miner's chronic obstructive pulmonary disease was not caused by his coal mine employment but rather was caused by his cigarette smoking history. *See Stiltner*, 86 F.3d at 341, 20 BLR at 2-254; Director's Exhibit 38. Thus, contrary to claimant's argument, none of the challenged physicians rendered a conclusion based on a premise that is fundamentally at odds with the statutory and regulatory scheme of the Act. Accordingly, we reject claimant's contention in this regard. Furthermore, claimant's contention concerning the lack of recency of the opinions of Drs. Scott, Tuteur, and Bush is without merit where "a bare appeal to recency is an abdication of rational decision making." *Allen v. Director, OWCP*, 69 F.3d 532, 20 BLR 2-97, 2-101 (4th Cir. 1995) (table); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993).

Finally, claimant contends that her right to due process was violated because she was denied the opportunity to confront and to cross-examine Drs. Scott, Tuteur, and Bush regarding their medical opinions in this case. Claimant argues that because the medical reports of Drs. Scott, Tuteur and Bush were "buried within the massive stack of documents" her attorney received while the litigation of this matter was pending and because employer failed to emphasize these reports, instead of only emphasizing the opinion of Dr. Sinnenberg, claimant was denied a reasonable opportunity to confront and to cross-examine these physicians.

Claimant's assertion lacks merit. A review of the record reveals that claimant's counsel has been

representing claimant since she initially filed the survivor's claim in 1996. At the formal hearing held on December 18, 1997, counsel for claimant was present when the reports of Drs. Scott, Tuteur, and Bush, contained at Director's Exhibit 38 with all of the documents pertaining to the miner's claim, were admitted into the record and counsel did not object to their admission. *See* [1997] Hearing Transcript at 5-6; [1988] Decision and Order at 2. Moreover, claimant, by counsel, did not raise this argument at any time during the prior proceedings in this case. Absent exceptional circumstances, a claim not raised before the administrative law judge is waived. *Bracher v. Director, OWCP*, 14 F.3d 1157, 18 BLR 2-97 (7th Cir. 1994); *Thorn*, 3 F.3d at 717, 18 BLR at 2-22; *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986); *See Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984) (Board will not address issue raised for first time on appeal). Furthermore, it is not the responsibility of employer, or any other party, to inform claimant's counsel as to which exhibits are, or are not, important or particularly significant.

Based on the foregoing, we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) as this finding is rational, contains no reversible error, and is supported by substantial evidence. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). [4] Because claimant has failed to satisfy her burden to establish that the miner suffered from pneumoconiosis, a requisite element of entitlement under Part 718, we affirm the administrative law judge's finding that claimant is not entitled to benefits. *See* 20 C.F.R. §718.202(a); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director*,

[4]Citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), claimant argues that the Board, in its prio decisions, erroneously interpreted the holding in *Williams* concluding that the administrative law judge's failure to state what weight he assigned to a particular item of evidence constituted a failure to actually consider that item of evidence, and as such, his decision failed to demonstrate that he weighed all the evidence together. Claimant's failure to raise this issue previously obviates the need for the Board to address it now. *See* 20 C.F.R. §802407; *see also Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984) (Board will not address issue raised for first time on appeal). Notwithstanding, a review of the case history reveals that claimant's assertion is without merit.

OWCP, 9 BLR 1-1, 1-2 (1986)(*en banc*).

Accordingly, the Decision and Order on Second Remand – Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

S_____
ROY P. SMITH
Administrative Appeals Judge

S_____
BETTY JEAN HALL
Administrative Appeals Judge

S_____
JUDITH S. BOGGS
Administrative Appeals Judge

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4462

JUDY RICHARDS,
Executrix of the Estate of Barbara Ray,

Petitioner,

v.

DIRECTOR, OFFICER OF WORKERS' COMPENSATION PROGRAMS,
United States Department of Labor;
KEYSTONE COAL MINING CORPORATION,

Respondents.

On Petition for Review of the September 28, 2004,
Decision and Order of the United States
Department of Labor Benefits Review Board
(BRB No. 03-0824 BLA)

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 16, 2005

Before: SLOVITER, SMITH, AND VAN ANTWERPEN,
Circuit Judges.

(Filed: December 21, 2005)

OPINION OF THE COURT

VAN ANTWERPEN, Circuit Judge.

Before us is Judy Richard's petition for review of the September 28, 2004, Decision and Order of the United States Department of Labor's Benefits Review Board (the "Board"). In that Decision and Order, the Board affirmed the August 11, 2003, Decision and Order on Second Remand of the Administrative Law Judge ("ALJ"), in which the ALJ determined that Richards did not establish eligibility for survivor's benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45, because she failed to prove that pneumoconiosis was a substantially contributing cause of her father's death.

We have jurisdiction over this matter pursuant to 33 U.S.C. § 921(c), and, for the reasons set forth below, we will deny the petition for review.

I.

Because we write only for the parties, we will set forth only the facts necessary to this opinion.

Ralph E. Ray, Sr., a long-time cigarette smoker, worked in various coal mines from 1973 to 1987. Pursuant to the Black Lung Benefits Act, Ray filed a claim for pneumoconiosis benefits in 1987 (the "1987 miner's claim") that was denied in 1989 on the ground that the x-ray evidence did not establish the existence of pneumoconiosis and that the preponderance of better-qualified physicians who had reviewed the case were not of the opinion that Ray suffered from pneumoconiosis.[1]

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[1]Seven doctors gave medical opinions in connection with the 1987 miner's claim. Drs. Eligator, Cander, and Connelly, were of the opinion that Ray suffered from

Ray died on April 18, 1996. On May 17, 1996, Judy Richards filed a survivor's claim for benefits on behalf of her sister, Barbara A. Ray, a surviving disabled dependent child of Ray. To establish eligibility for

survivor's benefits, Richards was required to prove by a preponderance of the evidence that black lung disease (pneumoconiosis) was a "substantially contributing cause" of Ray's death. 20 C.F.R. § 718.205(c)(5). Any condition that actually hastens a miner's death, even briefly, is considered a "substantially contributing cause." Lukosevicz v. Director, OWCP, 888 F.2d 1001, 1005 (3d Cir. 1989).

The evidence relevant to the survivor's claim consisted of x-rays, a CT scan, various medical studies, medical reports from the 1987 miner's claim, and medical reports from Drs. Scott, Wald, and Sinnenberg. Drs. Scott and Sinnenberg did not believe that Ray's death was caused by pneumoconiosis. Dr. Scott, a "B" reader[2] who is certified in internal medicine and pulmonary disease, believed that Ray died of chronic obstructive pulmonary disease ("COPD") with complications caused by his cigarette smoking, and did not believe that exposure to coal dust caused Ray's death. Dr. Sinnenberg, who is

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pneumoconiosis. Drs. Scott, Tuteur, Bush, and Bajwa, believed that Ray did not have pneumoconiosis. Scott, Tuteur, and Bush were all board-certified in internal medicine and pulmonary diseases and Dr. Cander was certified in internal medicine only. The credentials of Drs. Eligator, Connelly, and Bajwa were unknown.

[2]A "B" reader has passed an examination from the National Institute for Occupational Safety and Health, and is deemed more qualified than someone who has not passed the exam to interpret x-rays for pneumoconiosis. 42 C.F.R. § 37.51; Pavesi v. Director, 758 F.2d 956, 958 n.1 (3d Cir. 1985).

board-certified in pathology, reviewed Ray's medical records and testified at a deposition that Ray probably had a mild form of pneumoconiosis that did not play any role in his death. Dr. Wald, an "A" reader[3] who is board-certified in internal medicine, disagreed with Drs. Scott and Sinnenberg and concluded that although the x-rays and CT scan did not establish pneumoconiosis, Ray's exposure to coal dust was a substantial factor in the progression of his COPD and his death.

On April 21, 1998, the ALJ issued a Decision and Order that granted Richards's claim for benefits pursuant to 20 C.F.R. § 718.205(c). The ALJ found credible Dr. Wald's opinion that Ray's death was at least in part due to pneumoconiosis.

Ray's employer, Keystone Coal Mining Corporation ("Keystone") appealed, and on May 21, 1999, the Board vacated the ALJ's Decision and Order and remanded the matter to the ALJ for further proceedings. The Board did so on the grounds that the ALJ had not reviewed and collectively weighed all of the pertinent evidence as is required under Penn Allegheny Coal Corp. v. Williams, 114 F.3d 22 (3d Cir. 1997), noting specifically that (1) the ALJ stated that x-ray evidence corroborated his finding that Ray had shown the existence of pneumoconiosis, but did not explain how this was so, and (2) that the ALJ did not explain what weight he accorded to CT scan readings that were negative for pneumoconiosis.

In his Decision and order on Remand, dated August 31, 1999, the ALJ again

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[3]A "B" reader is regarded as having greater expertise than an "A" reader. Pavesi, 758 F.2d at 958 n.1.

granted benefits to Richards. The ALJ was persuaded by Dr. Wald's statement that the negative x-ray evidence did not preclude a finding of pneumoconiosis because Ray's emphysema condition could have masked evidence of pneumoconiosis. The ALJ noted that although Dr. Sinnenberg concluded that Ray's COPD was due to smoking, Sinnenberg admitted that Ray "probably" had pneumoconiosis, and that this admission was supported by opinions from the 1987 miner's claim from Drs. Eligator and Connelly, both of whom had diagnosed pneumoconiosis. The ALJ also noted that Drs. Rao and Patel both diagnosed Ray as suffering from "cor pulmonale,"[4] which the ALJ determined – citing Board precedent – was an indicator of pneumoconiosis.

Keystone then appealed the Decision and Order on Remand to the Board. On January 29, 2001, the Board again remanded the matter to the ALJ. The Board did so on the grounds that (1) the ALJ again failed to explain what weight he accorded to the CT scan that was negative for pneumoconiosis, (2) the ALJ erred in interpreting prior Board decisions as establishing that cor pulmonale was an indicator of pneumoconiosis, (3) the

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[4]Cor pulmonale is a cardiovascular disease and is defined as:

> "Right ventricular (RV) enlargement secondary to malfunction of the lungs, producing pulmonary artery hypertension that may be due to intrinsic pulmonary disease, an abnormal chest bellows, or a depressed ventilatory drive. The term does not include RV enlargement secondary to left ventricular (LV) failure, congenital heart disease, or acquired valvular heart disease. CP is usually chronic but may be acute and reversible."

See Mancia v. Director, OWCP, 130 F.3d 579, 585 (3d Cir. 1997) (citing The Merck Manual, Cardiovascular Disorders (16th ed. 1992)).

ALJ provided no basis for his decision to credit the medical opinions of Drs. Eligator and Connelly from the 1987

miner's claim as supporting Dr. Sinnenberg's opinion in the survivor's claim that Ray had pneumoconiosis, and (4) the ALJ erred by citing in his opinion a medical treatise that was not part of the record and had not been provided to the parties.[5]

On August 11, 2003, the ALJ issued a Decision and Order on Second Remand in which he denied survivor's benefits on the ground that Richards had not proven the existence of pneumoconiosis. The ALJ was no longer persuaded by Dr. Wald's opinion that Ray suffered from pneumoconiosis and instead found credible Dr. Scott's opinion that Ray did not suffer from pneumoconiosis.

The ALJ first observed that Dr. Wald had stated that although he did not see evidence of pneumoconiosis on the x-rays or CT scan, he believed that this was so because radiographic evidence of pneumoconiosis on the x-rays or CT scan might have been present but masked by Ray's emphysema. The ALJ noted, however, that Wald admitted that this opinion was "just conjecture." Next, the ALJ

observed that Dr. Wald, who is certified in internal medicine but not in pulmonary diseases, had rejected the 1989 finding that Ray did not suffer from legal pneumoconiosis, thus disagreeing with the opinions of three Board-certified pulmonary specialists, Drs. Scott, Tuteur and Bush.

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[5]Richards appealed the Board's January 29, 2001 decision to this Court, and we granted Keystone's motion to dismiss that appeal because we lacked jurisdiction over the appeal as premature.

The ALJ also believed that Dr. Wald's credibility was diminished because Dr. Wald had examined Ray's medical records only after Ray's death, while Drs. Scott and Bush had examined Ray during his life.

The ALJ also found Dr. Sinnenberg's opinion not credible. The ALJ determined that Dr. Sinnenberg's opinion that Ray suffered from pneumoconiosis was equivocal, observing that Sinnenberg stated that Ray "probably" had pneumoconiosis. The ALJ also noted that

the fact that Sinnenberg's area of expertise was pathology and not pulmonary medicine weighed against crediting his opinion. The ALJ stated that he was no longer persuaded by the opinion of Dr. Eligator on the grounds that Eligator was unaware of Ray's extensive cigarette smoking history and that Eligator's credentials were not in evidence. The ALJ noted that Dr. Connelly had also relied on an understated smoking history in arriving at his conclusion that Ray's death was due to pneumoconiosis. By contrast, the ALJ observed that Dr. Scott's opinion properly accounted for Ray's long smoking history.

Finally, the ALJ noted that the x-ray and CT scan evidence was "overwhelmingly negative" for pneumoconiosis, Ray was a cigarette smoker who smoked heavily for more than twice the number of years that he worked in the coal mines, and that Ray's exposure to coal dust ended nine years before his death; this was more supportive of the opinions of Drs. Scott, Tuteur, and Bush than that of Dr. Wald.

Richards appealed the ALJ's Decision and Order on Second Remand to the Board on the ground that the ALJ erred by finding not credible the medical opinions upon which he had relied in his earlier decisions. On September 28, 2004, the Board issued a Decision and Order in which it affirmed the ALJ's Decision and Order on Second Remand. In that decision, the Board concluded that the ALJ did not err in reversing his earlier credibility determinations and that the ALJ's ultimate determination that Richards failed to establish the existence of pneumoconiosis was supported by substantial evidence.

II.

We examine the Board's decision for errors of law and review the ALJ's decision to determine whether it was supported by substantial evidence. Mancia v. Director, OWCP, 130 F.3d 579, 584 (3d Cir. 1997). Substantial evidence is more than a mere scintilla; "[i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. If substantial

evidence exists, this Court must affirm the ALJ's interpretation of the evidence even if we might have interpreted the evidence differently in the first instance. Balsavage v. Director, OWCP, 295 F.3d 390, 395 (3d Cir. 2002).

III.

We are sensitive to the distress that the ALJ's reversal of his initial credibility determinations may have caused for Richards and to the fact that this matter has circulated up and down through the review process several times. Nevertheless, our review of the record leads us to conclude that the ALJ's Decision and Order on Second Remand was supported by substantial evidence and that the Board committed no error of law by remanding this matter to the ALJ under Penn Allegheny.

Richards argues that the Board erred by affirming the ALJ's determination that Richards did not prove that Ray suffered from pneumoconiosis. In support of this argument, Richards claims that the ALJ erred in

discounting the opinions of Drs. Wald and Sinnenberg after having initially credited those opinions.[6] We disagree and conclude that the ALJ's decision to discount the opinions of Drs. Wald and Sinnenberg in favor of those of Drs. Scott, Tuteur, and Bush, was supported by substantial evidence.

ALJs may grant greater weight to the opinions of physicians who have superior credentials to resolve conflicting medical opinions, Adkins v. Director, OWCP, 958 F.2d 49, 52 (4th Cir. 1992), and we accord ALJs "broad discretion" in determining the weight accorded to a doctor's medical opinion. Balsavage, 295 F.3d at 396. We think that the ALJ's weighting of the various medical opinions in the record was supported by substantial evidence.

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[6]In a related argument, Richards takes the position that the ALJ erred by reversing his previous credibility determinations because those determinations were affirmed by the Board and became the "law of the case." This

assertion is not supported by the record – both times that the Board vacated the ALJ's Decision and Orders, the Board made clear that it was vacating the ALJ's decision and was remanding for reconsideration of the relevant evidence, which by nature includes the medical reports at issue.

We also reject Richards's argument that the ALJ's reversal of his initial credibility determinations was "arbitrary and capricious." We find no support in the case law for this standard, and, in any event, we conclude that the well-founded reasons that the ALJ put forth in his Decision and Order on Second Remand for reversing his earlier credibility determinations foreclose any argument that the reversal was done in an arbitrary and capricious manner.

First, an ALJ may rationally prefer the opinion of a "B" reader over that of a non-"B" reader. Evosevich v. Consol. Coal Co., 789 F.2d 1021, 1023 (3d Cir. 1986); see also Pravesi v. Director, 758 F.2d 956, 958 n.1 (3d Cir. 1985) (observing that "B" readers are regarded as having greater expertise than "A" readers in evaluating x-rays for the presence of pneumoconiosis). Dr. Wald is a "A" reader while Dr. Scott is a "B" reader, and the ALJ was accordingly within his discretion to give greater weight to Dr. Scott's interpretation of Ray's x-rays than to Dr. Wald's interpretation.

Second, Drs. Scott, Bush and Tuteur are board-certified pulmonary specialists, while Dr. Wald is board-certified only in internal medicine. Although Dr. Wald's credentials are not to be ignored, they were not superior to the those of Scott, Tuteur, and Bush as they pertain to skill in the diagnosis of pneumoconiosis. Accordingly, the ALJ properly credited Drs. Scott, Tuteur, and Bush over Dr. Wald. See Adkins, 958 F.2d at 52.[7]

Similarly, the ALJ was within his discretion to accord diminished weight to Dr. Sinnenberg's opinion on the ground that it was equivocal. ALJs may accord less weight to equivocal opinions, Griffith v. Director, OWCP, 49 F.3d 184, 186 (6th Cir. 1995);

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[7]Richards argues that the ALJ should not have credited Drs. Scott, Tuteur, and Bush because, "in the opinion of Claimant," their reports were "antithetical" to the central concept of the Black Lung Act that coal dust may cause pneumoconiosis. It is axiomatic that we accord no weight to Richards's opinion regarding the doctors' reports, and, in any event, Richards's criticism is misplaced

– the cited doctors stated only that coal dust did not contribute to the miner's death *in this case*, not that coal dust could *never* contribute to pneumoconiosis.

Risher v. OWCP, 940 F.2d 327, 331 (8th Cir. 1991), and Dr. Sinnenberg opined in this case only that Ray "probably" had pneumoconiosis. Accordingly, the ALJ did not err by dismissing that opinion as equivocal.

Finally, Richards argues that the Board's remanding of the case to the ALJ to explain the weight of the CT scan evidence was improper under our decision in Penn Allegheny because doing so was "patently unreasonable" and was tantamount to a demand that the ALJ render a "perfect decision." We disagree and conclude that the Board's decision to remand this matter to the ALJ was proper under Penn Allegheny.

We made clear in Penn Allegheny that "all types of relevant evidence *must be weighed together* to determine whether the claimant suffers from the disease." 114 F.3d at 25 (emphasis added). As discussed supra, the CT scan did not show evidence of pneumoconiosis but the ALJ

nevertheless determined that Ray suffered from the disease. The Board's decision to remand the case to the ALJ to determine what weight (if any) he accorded to CT scan evidence that was negative for the disease was within the mandate of Penn Allegheny. Cf. Consol. Coal. Co. v. Held, 314 F.3d 184, 187 (4th Cir. 2002) (determining that Penn Allegheny's weighing of all relevant evidence was the "proper approach" and vacating ALJ's decision where ALJ failed to balance predominantly negative x-ray evidence against mixed medical opinion evidence). Accordingly, we find no error in the Board's remanding this case to the ALJ for a weighing of the CT scan evidence.

IV.

For the foregoing reasons, we conclude that the ALJ's decision was supported by substantial evidence and that the Board committed no error of law. Accordingly, we will deny the petition for review. We have considered all of the other arguments advanced by the parties and conclude that no further discussion is necessary.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1785

RICHARDS

vs.

KEYSTONE COAL MINING

SUR PETITION FOR REHEARING

PRESENT: BECKER, Chief Judge
SLOVITER, MANSMANN, SCIRICA,
NYGAARD, ALITO, ROTH, MCKEE, RENDELL,
BARRY, AMBRO, FUENTES and
ALDISERT, * Circuit Judge.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available judges of the circuit and regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court and banc, the petition for rehearing is denied.

BY THE COURT,

S
Circuit Judge

*Senior Circuit Judge Aldisert voted only as to panel rehearing.
DATED: Aug. 20, 2001

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 25, 2001
#C-112

No. 01-1785

JUDY RICHARDS, o/b/o Barbara Ray, Petitioner
v.
KEYSTONE COAL MINING CORPORATION, et al.
(On Appeal from Petition for Review of the Benefits Review Board No. 00-0152BLA)

Present: MANSMANN, RENDELL, and ALDISERT, Circuit Judges

1. Motion by Respondent, Keystone Coal Mining Corp., to Dismiss Petition for Review for Lack of Jurisdiction;

2. Motion by Respondent, Director, OWCP, to Dismiss Petition for Review for Lack of Jurisdiction as Premature;

3. Response by Petitioner to Motion to Dismiss Petition for Review for Lack of Jurisdiction as Premature.

S
Nicole M. Bruno
Case Manager (267)299-4924

ORDER

The foregoing *Motions to Dismiss are granted.*

By the Court,

S
Circuit Judge

Dated: Jul 23 2001

WESTMORELAND COUNTY

IN RE: :

ESTATE OF : DOCKET NO.

BARBARA A. RAY, : 65-00-2329

(Deceased) :

CLAIM

To the Clerk of the County Court of Westmoreland County:

Index and make proper entry in your official records of the claim of the United States Department of Labor, Division of Coal Mine Workers' Compensation Programs, in the amount of $23,369.80 against the estate of the above named decedent. An overpayment was created as a result of an Administrative Law Judge's reversal.

The said decedent, who resided at 511 Route 356, Apollo, Pennsylvania, 15613, died on November 6, 2000.

Written notice of this claim was given to David Colecchia, Esquire, 542 Hamel Avenue, Greensburg, Pennsylvania 15601 and Judy Richards, Administrator, 511 Route 356, Apollo, Pennsylvania 15613 on March 27, 2006.

S

Catherine Oliver Murphy
Regional Solicitor
Office of the Solicitor
U.S. Department of Labor
Suite 630 East
The Curtis Center
170 S. Independence Mall West
Philadelphia, PA 19106-3306

RE: Estate of Barbara A. Ray
Date of Death: November 6, 2000
Amount of Unpaid Claim: $23,369.80
Number of
SSN Claim Number: GR 206-24-3248

STATE OF: Pennsylvania

COUNTY OF: Westmoreland

AFFIDAVIT

The undersigned, having been duly sworn according to law, hereby deposes and states that the following is true and accurate to the best of his/her information, knowledge and belief:

1. I am the District Director, Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation, United States Department of Labor. As such, I have the authority and responsibility to render determinations regarding overpayments made under the Black Lung Benefits Act, as amended, 30 U.S.C. 901, et. esq.

2. I certify that I have determined pursuant to the 20 C.F.R. 725.540, et. seq., that the subject individual has received an overpayment of benefits under the Black Lung Benefits Act in the amount set forth herein, and that, under 20 C.F.R. 725.542, no waiver or adjustment of said overpayment is permissible.

3. I further certify that the information submitted accurately reflects the status of said overpayment and that the subject individual is indebted to the Office of Workers' Compensation Programs in the amount set forth herein.

S
COLLEEN S. SMALLEY
District Director

Sworn and subscribed before me
this 6th day of March 2006

S
Notary Public My commission expires: